# International Law, Cyberspace and Social Movements: A Critical Interjection

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## Abstract

The "international" has for long been imbued with dreams of emancipation, unity and sociality beyond the boundaries of the "national". However, despite its centrality, little critical reflection has been directed at the "international" within the discourse of international law. Specifically, the socio-spatial fabric of this concept/category is rarely discussed. This thesis seeks to theoretically disrupt and problematise this disciplinary comfort zone by highlighting the non-territorial socio-spatiality of cyberspace.

Arguing for a fundamental re-conceptualisation of the "international", this thesis develops on the basis of a re-reading of two modes of analysis, namely *logos* and *nomos*. While the former is associated with a territorial configuration of socio-spatiality, the latter is thought as a lived and co-produced understanding of law, space and society. The thesis proceeds with offering cyberspace as an instance of non-territorial and internationally experienced socio-spatiality (*nomos*), which fundamentally differs from how it is currently conceptualised under international law (*logos*). The thesis proceeds with an exploration of international law's socio-spatial fabric, arguing for a fundamental re-thinking, from a predominantly territorial configuration (*logos*), to a non-territorial and lived account of the "international" (*nomos*). The thesis is further illustrated through a critical reflection on the social movements and international law literature, arguing that *nomos* is the right mode of analysis for international law, in a world where normative claims and emancipatory dreams are increasingly woven into the non-territorial fabric of everyday life.

## Contents

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*The inferno of the living is not something that will be; if there is one, it is what is already here, the inferno where we live every day, that we form by being together. There are two ways to escape suffering it. The first is easy for many: accept the inferno and become such a part of it that you no longer see it. The second is risky and demands constant vigilance and apprehension: see and learn to recognize who and what, in the midst of the inferno, are not inferno, then make them endure, give them space.*

Italo Calvino

# Chapter 1 – International Law, Cyberspace and Social Movements

## 1.1. Introduction

Let me begin by presenting three narratives. The first, concerns a 16 year old boy living in Croatia, the second, a woman in her fifties living in a conservative family in Palestine, and third, an Iranian man living in the UK in the aftermath of the 2009 Presidential elections in Iran.[1]

*a) Marko is a quiet boy, who rarely speaks in the presence of adults, spending most of his time on his phone and his laptop. You might become curious about his daily life and slightly worried about his apparent lack of social interaction and seeming reclusiveness if you were to spend any time with him. If you ask him about his daily habits and routines, what would you find out about his social life? In fact, Marko can introduce you to an uncharted space of social interactions, friendships and experience. He is neither reclusive, nor a-social, but indeed has a diverse world of communications and connections that show no sign of physical/territorial limitation. In addition to membership of social networking websites, such as Facebook, Instagram, Snapchat, etc., which largely revolves around his school friends and the resulting extended network of feeds and interactions, the range of other means and "spaces" of communications used by him proves eye opening. He speaks of his friends in Norway, a "girlfriend" in Minnesota, or finding an old childhood friend of his who moved to South Africa through her Tumblr page. You are also impressed by his experience of playing web-based games or massively multiplayer online role-playing games (MMORPGs), where participants take on characters and perform roles within an "online environment". They become members of groups and social groupings involved in a range of "activities", from war, to agriculture, to exchange of "goods" and "money" amongst a very large*

[1] The "stories" I present are fictional, but based on my observations of similar existing examples.

*number of players. The way Marko speaks of these social interactions is indicative of how he is experiencing them as real and important social relations in his life. He tells you of positive and negative stories, of both the perks and dangers in these forms of social relationship. It is also clear from your chat that, even though he acknowledges that these players are real people somewhere in the world, connected to the Internet through their computers, the territorial location of these people is not of much concern (of course so long as they spoke Croatian or English).*

*Next, consider Zaynab, a woman in her fifties in Palestine from a conservative Muslim family. She lives with her husband and two children. Her daily social interactions scarcely go beyond her home, extended family and the local market. She spends the majority of her time in the private space of her home, looking after her grandchildren. When male guests (her husband's friends and acquaintances), visit the house, she withdraws further to the areas of the house which are only accessible to the immediate family, creating a public/private divide inside the house. After preparing the tea for her husband's guests, she sits behind the computer in their bedroom, signing in to Facebook under a different name, with an image of a flower as her "profile picture". She has recently learned to type and has a number of friends and extended family members dispersed around the world, with whom she regularly interacts, sharing day to day experiences and hearing stories and news from different localities. Meanwhile she reads the news on a number of Arabic news websites, sometimes writing comments in the "comments" sections, engaging in conversations about a range of topics, with people that she would not normally be able to interact with easily. She visits websites that give instruction to Muslim women on marriage, on dress and on pray, participating in conversations initiated far from the territory of Palestine. The sociality that she experiences in the "privacy" of her bedroom is anything but private. Her ability to have an anonymous identity online enables her to interact with "strangers" (male or female) going beyond the limitations imposed on the types of social interactions she can perform through her role as a Muslim housewife. If she wants to, and has access to the Internet, neither her physical location, nor the location of the other participants in the interactions, hinder her ability to experience sociality beyond the usual physical, religious, or ethical boundaries.*

*Finally, think of Arash, a young Iranian man who moved to London to do a university degree in law and politics. He has studied, and is studying, international human rights and is involved in the Green Movement (a social movement that ensued in the aftermath of the 2009 presidential elections in Iran). Dubbed the "Twitter Revolution" by some,[2] participation in the Green Movement, like many other recent/contemporary social movements, involved a great deal of online activism (i.e. membership in special social networking groups, following Twitter "trends", blogging and a great deal of "street journalism"). Arash divided his time between participating in rallies in London and maintaining a strong "online presence". He posted articles on Twitter and Facebook and was involved in many debates and social interactions on a wide range of topics with numerous strangers (Iranian or otherwise, located inside Iran or outside). To his surprise, he realised that what he understood by international human rights was evolving the more he engaged in conversations. Arash became aware of the differences of opinion on the meaning, applicability or feasibility of certain rights within the Iranian context: often he observed common meanings and understandings (and equally disagreements and misunderstandings) developing between people within Iran and those outside. But this understanding belonged to a social space which was not territorially limited to either his socio-spatial context (Iranian diaspora in the UK) nor to Iran (as a territorially bounded socio-political space). This non-territorial social space was affecting his understanding of something that he was taught was "international".*

In the "digital age", the age of "mass-self communication", our social relations are becoming more and more *international,* but not through our governments, international institutions or NGOs. Instead, this is happening through our everyday interactions, in the space of daily life. Individuals and groups globally experience forms of sociality which do not follow the boundaries previously limiting the ability of people to engage in social relations. Of course, a large portion of people around the world still have little

[2] See for example J. Keller, "Evaluating Iran's Twitter Revolution." *The Atlantic.* 18 June 2010. www.theatlantic.com/technology/archive/2010/06/evaluating-irans-twitter-revolution/58337 (accessed September 2, 2014).

means, if any, to connect to the Internet. Yet, due to the exploding number of phones with Internet capabilities worldwide (even in remote areas of the developing world[3]) there is a real sense of increase in the availability of multiple means of communication beyond the old forms of spatial and temporal barriers to sociality. I call this newly enabled social space cyberspace.

This thesis explores the significance of these growing forms of sociality for international law. The stories above provide accounts of three distinct circumstances sharing a similar type of social experience; they all present a break with the conventional ways in which sociality is experienced and lived. They also demonstrate the expansion of the possibility and forms of engaging in social interactions that go beyond the usual boundaries and limitations. Through the use of the Internet, the three individuals experience society and space non-territorially. I associate this non-territorial experience of sociality with cyberspace, as distinct from the technological structure of the Internet.[4] This thesis aims at offering a critical re-description of international law using the socio-spatial experience/phenomenon of cyberspace as the framework for that critique. That is to say, it is a re-description primarily directed at offering an account of international socio-spatiality which fundamentally disrupts the predominant attitudes within international law towards the "international".

Thinking about international law in "social" terms (or through the image/language of sociality) is important and has always had a presence in the history of international law,

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[3] The use of phones to access the Internet in developing countries (e.g. sub-Saharan Africa) is especially noteworthy, since according to some researchers more than 70% of Internet users access the Internet through phones, and this number is expected to increase by as much as five times the current rate. See D. Smith, "Internet Use on Mobile Phones in Africa Predicted to Increase 20-Fold." *The Guardian*. 5 June 2014. www.theguardian.com/world/2014/june/05/internet-use-mobile-phones-africa-predicted-increase-20-fold (accessed September 8, 2014). For information and statistics on mobile Internet use and the penetration of the Internet through phone handsets, see generally www.mobithinking.com/mobile-marketing-tools/latest-mobile-stats/b#internetphone.

[4] I elaborate on the distinction between the two, both later in this chapter, and in more detail in chapter four.

especially after the decline of natural law thinking.[5] Attempts were made to counter the transcendent detachment of naturalism, by imagining a society, or community for international law where laws are made, lived and experienced.[6] One might argue that the turn to positivism in international law was with the aim of connecting law with the socio-political conditions of the world, while holding on to some form of "higher goal".[7] What I draw on in my critical account is the consistent territorial configuration of this sociality within the story of international law. Even the critiques of positivism, still often accommodate a sociality that is territorially configured. This is despite their criticism being directed at disrupting the centrality of the nation state through socio-historical methods of critique. These critiques include, the turn to juridical procedure and institutions in the early twentieth century,[8] the post WWII process oriented instrumentalism within an expanded institutional framework,[9] and the more recent critical interventions in international law.[10] Therefore, the thesis is partly dependent

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[5] The traditional sensibility of international lawyers, and the importance of sociality as a central element, is reflected in the work of scholars such as James Crawford. He argues that "international society is no exception to the maxim of *ibi societas, ibi ius*: where there is social structure, there is law." See J. Crawford, *Brownlie's Principles of Public International Law*. 8th. Oxford: Oxford University Press, 2012.

[6] This is probably best articulated by looking at any textbook or edited volume of international law that starts by immediately locating international law within an "international" *society* or *community*. For examples, see M. N. Shaw, *International Law*. Cambridge: Cambridge University Press, 2003: 2; *or* A. Cassese (ed.), *Realizing Utopia: The Future of International Law*. Oxford: Oxford University Press, 2012. This is also visible through the doctrine of sources, both with respect to state consent (as a member of a wider society consenting to the norms) or customary international law (which envisions a norm developing through the "social" relations of nation states through time).

[7] M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* [hereinafter *"From Apology to Utopia"*]. Cambridge: Cambridge University Press, 2005.

[8] L. F. L. Oppenheim, *The Future of International Law*. Oxford: Clarendon Press, 1921.

[9] See for instance, M. Reisman, "The View from the New Haven School of International Law." *Proceedings of the 86th Annual* Meeting *of the American Society of International Law* (American Society of International Law), 1992: 118-125; *or* M. S. McDougal, and M. Reisman. "The Prescribing Function in World Constitutive Process: How International Law is Made." *Yale Studies in World Public Order* 6 (1980): 249. For an insightful analysis see I. Scobbie, "Wicked Heresies or Legitimate Perspectives? Theory and International Law." In *International* law, edited by Malcolm D. Evans, 58-94. Oxford: Oxford University Press, 2010.

[10] For instance, see D. Kennedy, *Inernational Legal Structures*. Baden-Baden: Nomos, 1987; *or* M.Koskenniemi, *From Apology to Utopia. Supra* note 7.

upon demonstrating that a consistent element of international law has always been to locate law within a (limited/territorial) conception of society and sociality.

I am going to use two modes of analysis to look at law as a way of exploring the issues described above, namely, *logos* and *nomos*. The contrast between these two 'modes of analysis' or 'conceptions of law', highlights critical aspects of the relationship between law, the "social" and the "spatial" both generally, and more specifically in international law. My argument, ultimately, is that *nomos* facilitates an attentiveness to the fundamental question of sociality, which has nearly always been present in accounts of (international) law but which is often disguised, or underplayed, in accounts that assume *logos* as the central framework for thinking about law. I will demonstrate the limitations of *logos* as a mode of analysis for international law and will explicate the necessity of accommodating the forms of sociality captured by *nomos*.

In order to offer a tangible illustration of the critique of my thesis, I look at one form of criticism directed at the standard organisation of international law, which comes through the medium of social movement theory. The literature that I will refer to as "social movements and international law" (SMIL), successfully disrupts the conventional account of the life and development of international law's socio-legality, through emphasising the often-ignored role of social movements. However, I will suggest that this disruption is only partial. This is because it tends to reinforce an account of sociality which is again limited by the socio-spatial logic (of *logos*), which I argue is hardwired in the predominant accounts of "international" in international law. This critique is important, since one of the key characteristics of contemporary social movements is the value they place upon cyberspace as a medium for the organisation of national and transnational activism. As a consequence, relying on the conventional analytics will not capture the fundamental non-territoriality of experience woven into

their operational fabric. Therefore, it is argued that if social movements theory is to carry the form of disruptive critique at which it aims, then it needs to pay more attention to the different forms of socio-spatiality that are exemplified through cyberspace.

My critical use of cyberspace in this thesis, seeks to further the insights of scholars such as Sundhya Pahuja, Louis Eslava, Hilary Charlesworth, Anthony Anghie and Bhupinder S. Chimni in arguing for a connection with spaces and experiences of everyday life and/in international law.[11] For instance, Eslava, with a focus on the Global South, holds that the "international" is part of daily, local experience, tied to the materiality of people's activities in the organisation of the urban environment. Holding on to the idea that international law is very much surrounding us in the process of living our day to day lives, I seek to demonstrate that it is a mischaracterisation to think about international law as a set of relations conducted *within* diplomatic forums and international institutions, or amongst the scholars and experts. In doing so, I present cyberspace as a socio-spatial field of experience, which helps demonstrate how international law is working in different ways and "through" different spaces. In presenting cyberspace as an important and arguably indispensable part of our daily life, I argue that an analysis of cyberspace, and the critical possibilities it presents international law, is indeed a timely and necessary measure.

[11] S. Pahuja, "Laws of Encounter: A Jurisdictional Account of International Law." *London Review of International Law* 1, no. 1 (2013): 63-98; L. Eslava, "Istanbul Vignettes: Observing the Everyday Operation of International Law." *London Review of International Law* 2, no. 1 (2014): 3-47; H. Charlesworth, "International Law: A Discipline of Crisis." *The Modern Law Review* 65 (2002): 377-392; A. Anghie, and Bhupinder S. Chimni. "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts." *Chinese Journal of International Law* 2, no. 1 (2003): 77-103.

## 1.2. Theoretical/Methodological Preliminaries

### *1.2.1. On International Law*

In challenging the predominant approaches to the "international" in international law, through demonstrating the socio-spatial overlap between international law, cyberspace and social movements, it is essential to first locate my approach within the field of international law. Whilst later sections of this thesis are dedicated to the analysis of international law's predominant conceptual framework regarding the "international" (through a socio-spatial analysis), in this part of the introduction, I will briefly reflect on the predominant theoretical approaches to international law, pointing to their differences, and more importantly their similarities. Through this, in interrogating the conceptual possibilities and limitations of the discipline, I situate my thesis within the (broadly speaking) critical tradition of international law.

As Alan E. Boyle and Christine Chinkin point out in *The Making of International Law,*[12] while it is important to define one's understanding of international law, identification of an overarching theoretical framework is not as easy as it used to be. Rosalyn Higgins argues that "international law has to be identified by reference to what the actors (most often states), often without benefit of pronouncement by the international court of justice, believe normative in their relations with each other."[13] Although this definition is more inclusive and more process-oriented and relational than the traditional (doctrinal and positivist) approaches,[14] other schools of thought within international law

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[12] A. E. Boyle, and C. Chinkin, *The Making of International Law.* New York: Oxford University Press, 2007.

[13] R. Higgins, *Problems and Processes: International Law and How We Use it.* Oxford: Oxford University Press, 1994: 18.

[14] A traditional definition of international law is, for example, offered by Oppenheim's opening sentence which reads as: "Law of Nations or International Law (*Droit des gen, Völkerrecht*) is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other" L. F. L. Oppenheim, *International Law: A Treatise.* Edited by Hersch Lauterpach. Vol. 1. London: Longmans, Green and Co. Ltd., 1953: 4.

view the situation differently. Approaches include, but are not limited to, natural law thinkers (identifying international law with "superior law"),[15] positivists (seeing international law as rules and principles between states emanating from sovereign consent of international actors),[16] realists (treating international law as only one factor affecting international decision making, with power and politics as the main drive),[17] and New Haven or Yale School of international law (seeing international law through a largely instrumental lens).[18] All these approaches tend to presuppose a territorially configured sociality for the "international", ordered through rules and norms developed from and applied to the members of the "international society", largely seen as territorial states.

In contrast to the above approaches, critical thinkers and New Stream theorists (NAIL),[19] such as David Kennedy, Martti Koskenniemi, Costas Douzinas,[20] in addition

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[15] For examples of this, see A. E. Boyle and C. Chinkin, *The Making of International Law*. *Supra* note 12, at 11.

[16] For a quintessential positivist account of international law, see H. Kelsen, *Principles of International Law*. New Jersey: The Lawbook Exchange Ltd, 2003.

[17] For examples of a contemporary realist analysis of international law, see J. L. Goldsmith, and E. A. Posner, *The Limits of International Law*. New York: Oxford University Press, 2005. For a more traditional outlook see H. J. Morgenthau, "Positivism, Functionalism, and International Law." *American Journal of International Law* 34 (1940): 260.

[18] For a clear analysis of the New Haven school of thought, see M. Reisman, "The View from the New Haven School of International Law." *Proceedings of the 86th Annual Meeting of the American Society of International Law* (American Society of International Law), 1992: 118-125. For an analysis see I. Scobbie, "Wicked Heresies or Legitimate Perspectives? Theory and International Law." In *International law*, edited by Malcolm D. Evans, 58-94. Oxford: Oxford University Press, 2010.

[19] New Stream is also referred to as New Approaches to International Law. For an original reflection, see D. Kennedy, "A New Stream of International Law Scholarship." *Wisconsin International Law Journal* 7, no. 1 (1988): 1-49. For a recent analysis see A. Rasulov, "New Approaches to International Law: Images of a Genealogy." In *New Approaches to International Law: The European and the American Experiences*, edited by David Kennedy and José María Beneyto, 151-191. The Hague: TMC Asser-Springer, 2012.

[20]Taking up a critical outlook enables the questioning of the basis of arguments and inherent assumptions in international law, as thinkers have done in a number of fields within the field of international law such as Costas Douzinas on human rights, Martti Koskenniemi on the structure of arguments within international law and David Kennedy on humanitarian action. See C. Douzinas, *The End of Human Right*. Oxford: Hart Publishing, 2000; M. Koskenniemi, *From Apology to Utopia*. *Supra* note 7; *and* D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism*. Princeton: Princeton University Press, 2004.

to many feminist[21] and TWAIL (Third World approaches to international law)[22] scholars show their scepticism towards "law as rational, objective and principled by exposing the indeterminacy of and contradictions inherent in legal rules."[23] These critical approaches challenge assumed fixed subjectivities and structural biases supporting the apparent objectivity of laws. However, the fundamental category of the "international", rarely engaged with substantively and critically, in a way acts as a disciplinary comfort zone for even the critical scholars. In my project, I adopt a similar scepticism to these critical perspectives, and yet offer a re-conceptualisation of the way international law views its own legality, spatiality and sociality through the fundamental category of the "international". Hence, this thesis examines the failure of the discipline to interrogate the "international" as a category. In an effort to move away from the conglomeration of territorial states as the understanding of what constitutes the "international", I construct an alternative theoretical space for understanding the concept, building on the insight of critical (legal) geographers.[24] As such, I bring together the scepticism of critical, NAIL, TWAIL and social movements theories alongside the re-conceptualisation of space understood through the twinning of social and spatial theories. In turn, I use the

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[21] Feminist scholars direct their critical attention towards different forms of structural bias (gender, race, etc.) within international law. For instance, see C. Chinkin, and S. Wright, "The Hunger Trap: Women, Food, and Self-Determination." *Michigan Journal of International Law* 14 (1992-1993): 262-321; *or* H. Charlesworth, "International Law: A Discipline of Crisis." *The Modern Law Review* 65 (2002): 377-392; *or* G. Heathcote, *The Law on the Use of Force: A Feminist Analysis*. New York: Routledge, 2012.

[22] For examples of TWAIL scholarship, see importantly, amongst others, B. S. Chimni, "Third World Approaches to International Law: A Manifesto." *International Community Law Review* 8 (2006): 3-27; A. Anghie, *Imperialism, Sovereignty and the Making of International Law*. New York: Cambridge University Press , 2005; D. P. Filder, "Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law." *Chinese Journal of International Law* (OUP) 2, no. 1 (2003): 30-76; *and* L. Eslava, and S. Pahuja, "Between Resistance and Refrom: TWAIL and the Universality of International Law." *Trade, Law and Development* 3, no. 1 (2011): 103-130.

[23] H. Charlesworth, and J. S. Watson, "Subversive Trends in the Jurisprudence of Interntional Law." *Proceedings of the Annual Meeting* (American Society of International Law) 86 (April 1992): 125-131.

[24] Explained further in this chapter.

sociality of cyber-based contemporary social movements as a motif for a conception of international law that is able to encompass and re-imagine the "international".

My focus on the "international" is not rooted within an inherent internationalism as seen in the works of international lawyers such as George Scelle, Hersch Lauterpacht, and Alejandro Alvarez, who argued faithfully towards the possibility of an ordered international realm.[25] Instead, I direct my critique at the "international" and its socio-spatial fabric. Despite this, my work remains inspired in many ways by the said scholars because of their sociological sensibility.[26] This thesis also offers a fundamentally sociological intervention in international law, even though this intervention is different from what is broadly referred to as "sociological approaches to international law."[27] This project is different in two ways; theoretical and methodological. The first difference is that I do not view the sociality of the "international" as limited to what Koskenniemi refers to as "a tribe living somewhere between First and Second Avenues, around 45th and 50th street, New York, and compelled to negotiate with other tribes in a

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[25] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* [hereinafter *"Gentle Civilizer"*]. Cambridge: Cambridge University Press, 2001: 63-67.

[26] Scelle belonged to the tradition of the thinkers called "French Solidarists" who believed in an international order, with solidarity between a plurality of communities. For analyses of the 'French Solidarists', see *ibid.,* at 266-352. For a more specific focus on George Scelle, see H. Thierry, "The Thought of George Scelle." *European Journal of International Law*, no. 1 (1990): 193-208; *and* A. Cassese, "Remarks on Scelle's Theory of "Role Splitting" (dedoublement fonctionnel) in International Law." *European Journal of International Law*, no. 1 (1990): 210-231.
Lauterpacht, on the other hand, had a more Kantian internationalism, with a liberal/cosmopolitan perspective. For examples of Lauterpacht vision towards international law, see H. Lauterpacht, *The Function of Law in the International Community.* New Jersey: The Lawbook Exchange Ltd, 2000; *and* H. Lauterpacht, "Westlake and Present Day International Law." *Economica*, no. 15 (November 1925): 307-325. Or for a thorough analysis of his work and thought, see M. Koskenniemi, *Ibid.,* at 353-412.

[27] For an analysis of one of the earliest accounts of this approach by Max Huber, see J. Klabbers, "The Sociological Jurisprudence of Max Huber: An Introduction." *Austrian Journal of International Law* 43 (1992): 197-213. For a more recent reflection, see J. Delbrük, "Max Huber's Sociological Approach to International Law Revisited." *The European Journal of International Law* 18, no. 1 (2007): 97-113. For an analysis of sociological approaches to international legal history, see A. Orford, "On International Legal Method." *London Review of International Law* 1, no. 1 (2013): 166-197.

terrain that remains a no-man's land."[28] Neither do I simply see the sociality as limited to an "invisible college of international lawyers"[29] or a community of experts.[30] Through the latter view, the sociality of states is transformed into one of experts, who are still detached from the everyday life of law and the life of people around the world who are affected by such laws. Instead, I seek to construct a theoretical framework where the "terrain" does not remain a "no-man's land" anymore, but is perceived as a socio-spatial fabric, with experiences of sociality going beyond the limited version imagined by international lawyers so far.

### *International Law, Globalisation and Cyberspace*

The discourse of globalisation is a common theme within the framework of international law, where most common theorisations of cyberspace could be understood as part of the globalisation process and the regulatory challenges facing international law. Globalisation is believed to pose a continuing challenge at the traditional territorial state-centred nature of the international order. Amongst many articulations, David Held defines globalisation as "those spatio-temporal processes of change which underpin a transformation in the organization of human affairs by linking together and expanding human activity across regions and continents."[31] In addition, themes such as "interdependence", "transnationalism" and "homogenisation" have often characterised the descriptions of this process.[32] Others, such as Anthony Giddens, emphasise the social aspect of globalisation by pointing to the "'lifting out' of social

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[28] M. Koskenniemi, *Gentle Civilizer*. *Supra* note 25, at 515-516.
[29] O. Schachter, "The Invisible College of Internetional Lawyers." *Northwestern University Law Review* 72, no. 2 (1977): 217-227. For a socio-historical analysis of international lawyers and the development of their "collective" mind frames (such as French Solidarists, or Cosmopolitanists, etc.), see M. Koskenniemi, *Gentle Civilizer*. *Supra* note 25.
[30] D. Kennedy, "Challenging Expert Rule: The Politics of Global Governance." *Sydney Law Review* 27 (2005): 1-24.
[31] D. Held, *et al*., *Global Transformations: Politics, Economics and Culture*. Stanford: Stanford University Press, 1999: 15.
[32] See for instance, H. Shams, "Law in the Context of "Globalisation": A Framework of Analysis." *International Lawyer* 35, no. 4 (2001): 1589-1626.

relations from local contexts of interaction and their restructuring across indefinite spans of time-space."[33] The definitions of globalisation that emphasise "social change", point out changes to the socio-spatial fabric of life as are experienced by an increasing number of us. This is similar to what I point to in my thesis regarding the experiences of "non-territorial socio-spatiality." However, I differentiate my project from the predominant characterisation of globalisation in international law literature.

In facing these "spatio-temporal processes of change,"[34] a central theme in the relationship between international law and globalisation is the "withering away" of the state as the prime actor in the international sphere.[35] Instead, the role of "non-state actors" and institutions are emphasised in an increasingly interdependent world.[36] The "networked" operations of these actors in their plurality, are seen to pose a challenge for the largely (territorial) state-oriented view of international law making (and application).[37] Even though I acknowledge the significance of this regulatory challenge, these accounts often seem to collapse back on conflict of laws principles, treating the non-state actor as *located* within a territorial jurisdiction, having international or transnational operations. A tendency in these formulations is to then re-deploy a territorially configured analysis of law and regulation, which is largely formed by a state-oriented framework, albeit indirectly. Therefore, I do not find the literature on

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33 A. Giddens, *The Consequences of Modernity*. Cambridge: Stanford University Press, 1991: 21.
34 D. Held, *et al., Global Transformations: Politics, Economics and Culture. Supra* note 31.
35 The term "withering away" is taken from Martti Koskenniemi quoting Friedrich Engels saying "[t]he government of persons is replaced by the administration of things and by the conduct of processes of production. The State is not abolished. It withers away." See M. Koskenniemi, "The Wonderful Artificiality of States." *Proceedings of the 101st Annual Meeting* (American Society of International Law), 1994: 22. On the relationship between international law and globalisation, see amongst a wide range of analyses, D. J. Bederman, *Globalization and International Law*. New York: Pelgrave Macmillan , 2008; *or* P. S. Berman, "From International Law to Law and Globalisation." *Columbia Journal of Transnational Law* 43 (2005): 485-556.
36 For a recent analysis, see N. Bhuta, "The Role International Actors Other Than States Can Play in the New World Order." In *Realizing Utopia: The Future of International Law*, edited by Antonio Cassese, 61-75. Oxford: Oxford University Press, 2012.
37 A.-M. Slaughter, and D. Zaring, "Networking Goes International: An Update." *Annual Review of Law and Social Science* 2 (2006): 211-229. See also, P. S. Berman, "From International Law to Law and Globalisation." *Supra* note 35.

globalisation and international law particularly useful, since it still fails to fundamentally challenge the conceptual frameworks of international law in viewing its own socio-spatial fabric (the "international").

Within international law scholarship, cyberspace and the Internet most often appear as a central component of globalisation, posing regulatory difficulties for international law due to their cross border characteristics. In other words, globalisation and international law scholars are often concerned with the technological challenge to the regulatory frameworks available to international law.[38] Most importantly, these are jurisdictional challenges, mostly dealt with within the rubric of conflicts of laws.[39] Issues such as international cyber-security and cyber-warfare,[40] cybercrime,[41] cyber-terrorism,[42] right to access[43] and the like, have taken centre-stage in international law's attempts to face new regulatory challenges posed by cyberspace.[44] My thesis does not dismiss the importance of these challenges, yet views regulation and regulatory challenges as only one (small) aspect of the wider sociality of the "international" which is challenged and re-described through the analysis of cyberspace.

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[38] A. Murray, "Uses and Abuses of Cyberspace: Comingt to Grips the Present Dangers." In *Realizing Utopia: The Future of International Law*, edited by Antonio Cassese, 496-507. Oxford: Oxford University Press, 2012. J. Kulesza, *International Internet Law*. Translated by Magdalena Arent and Woloszyk Wojciech. New York: Routledge, 2012.

[39] See for instance, P. S. Berman, "Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era." *University of Pennsylvania Law Review* 153 (2005): 1819-1882. See also J. L. Goldsmith, "Against Cyberanarchy." *University of Chicago Law Review* 65, no. 4 (1998): 1119-1250.

[40] See generally, M. N. Schmitt, *Tallin Manual on the International Law Applicable to Cyber Warfare*. Cambridge : Cambridge University Press, 2013. See also Schmitt, Michael N. "Cyberspace and International Law: The Penumbral Mist of Uncertainty." *Harvard Law Review Forum* 126 (2013): 176-180; *and* O'Connell, Mary E., and Louise Arimatsu. *Cyber Security and International Law*. International Law: Meeting Summary, London: Chatham House, 2012.

[41] See discussion in chapter 2.

[42] Y. Shiryaev, "Cyberterrorism in the Context of Contemporary International Law." *San Diego International Law Journal* 14 (2012): 139-192.

[43] M. B. Land, "Toward and International Law of the Internet." *Harvard International Law Journal* 54, no. 2 (2013): 393-458.

[44] For an overview of these topics, see generally J. Kulesza, *International Internet Law*. *Supra* note 38.

In addition, a focus on globalisation sometimes invokes a binary between what is global and what is not. This, in turn, brings the non-global ("local") to the fore of the argument. For instance, Balakrishnan Rajagopal's analysis operates on the basis of an important (spatial) (di)vision; a perspective which presupposes a duality between "two contradictory processes" of globalization and localization.[45] Globalisation is seen as "driven primarily by economic [and institutional] factors," and localisation is characterised by a "turn to devolution and autonomy within nation states" and through the "emergence of global cities with their own material and symbolic sovereignty."[46] In chapter six, I demonstrate why this perspective reinforces the territorial sensibility that scholars of globalisation seem to be challenging in the first place. In this thesis, I offer a criticism which avoids bringing territorially configured spaces to the fore of the argument, by directing my attention to the fundamental socio-spatial framework(s) through which international law views the "international" more generally. To move beyond this binary, I work to move the study beyond the creation of a global space, in opposition to the local and to rely on a fluid understanding of space (society and law) provided in critical geography scholarship.

Therefore, while identifying cyberspace as a contemporaneous and global phenomenon, the work is largely distinct from discourse of globalisation in international law. Scholarship has thus far not turned observations regarding cyberspace back on to understandings of the fundamental categories of international law. More specifically there is a lack of scrutiny for the conceptions of the socio-spatial fabric of the "international" in the face of a phenomenon (cyberspace), which is in fact more than just a technological innovation, filled with cross border data. It is the failure to access and theorise the non-territorial spatiality of cyberspace that I seek to remedy in this

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[45] B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistence.* New York: Cambridge University Press, 2003: 267.
[46] *Ibid.,* at 267-268.

thesis. Therefore, this thesis is a step towards becoming aware of the "discursive framing of the spatiotemporal options" of international law.[47]

### *1.2.2. On Space and (International) Law*

If my concern with the socio-spatial fabric of international law positions me apart from the mainstream literature on globalisation and international law, it also runs against the current of much critical legal studies (CLS) literature. Nicolas Blomley, a renowned legal geographer, points out that CLS has largely taken temporality as the central mode of its critique, and argues in favour of a move away from history.[48] For Blomley, despite the "powerful, provocative and political" use of history in (critical) legal scholarship, a focus on time as *the* organising principle of critique "fail[s] to recognize the profound importance of space in the regulation of social life and the subversive potential of what might be called a geographic critique."[49] The aim of his critique was not necessarily to debunk time as an important critical method, but rather to bring the attention of scholarship to the central and intertwined nature of space with regards to social and legal phenomena. Following Blomley's insight, while acknowledging the importance of

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[47] I am borrowing this phrase from R. B. J. Walker. See R. B. J. Walker, *Inside/outside: International relations as Political Theory*. New York: Cambridge University Press, *1993*: 6.

[48] Nicolas Blomely associates the prioritisation of time in critique to "historicism" as a mode of thinking. However, historicism is not just one mode of thinking and encompasses a range of approaches and methods of theorisation. For instance, Karl Popper in *The Poverty of Historicism*, critically defines the term as "an approach to the social sciences which assumes that historical prediction is their primary aim, and which assumes that this aim is attainable by discovering the 'rhythms' or the 'patterns', the 'laws' or the 'trends' that underlie the evolution of history." K. Popper, *The Poverty of Historicism*. London: Routledge, 2002: 3. While prediction seems to play a central role in Popper's view of historicism, it is not a focus shared by all critics. Nonetheless, regardless of the specificity of the definitions and approaches, it is generally agreed that *time* is the central organising concept facilitating access to "history", and arguably to a critical reflection on the "present".

[49] N. Blomely, *Law, Space and Geographies of Power*. New York: The Guilford Press, 1994: 25. See also E. W. Soja, *Post-Modern Geographies: The Reassertion of Space in Critical Social Theory*. London: Verso, 1989: 10-32.

temporality, my thesis emphasises and highlights the ways in which we can complement the temporal dimension,[50] with a rethinking of space in international law.

The question of space as a category, concept, or straightforward fact, plays a central role in the development of this thesis, both theoretically and methodologically. In questioning the territorial configuration of sociality in international law, I draw on the insights of theorists of space such as Blomely, David Delaney and Irus Braverman, for whom "the world of lived social relations and experience, aspects of the social that are analytically identified as either legal or spatial are conjoined and co-constituted."[51] In other words, the social is not only the context in which law happens, or to which it is applied, but which *co-constitutes law, space and sociality simultaneously*. So, if one imagines law, space and society forming a triangle, the area of that triangle forms that "world of lived social relations and experience." My thesis, thus, is concerned with a re-description of the "international" in international law through the optic of cyberspace in order to bring into play this co-constitutive relationship.

## *The "Spatial Turn"*

In order to demonstrate the importance of the relationship between law and space, it is essential to first highlight how space relates to society (and sociality) more broadly. Within the last half century or so, social theory has experienced a turn to space as an important category of critique. Scholars such as Henry Lefebvre, Michel Foucault, Edward Soja and Doreen Massey, are amongst the critics who have played a crucial role

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[50] For the last century or so the bulk of critical focus in international law has been framed around the temporal questioning of law. An early example is Roscoe Pound's reflections on legal history in 1923. See R. Pound, *Interpretations of Legal History*. Cambridge: Cambridge University Press, 1923. For analysis of the role of temporality in international legal critique, see C. Landauer, "Regionalism, Geography, and the International Legal Imagination." *Chicago Journal of International Law* 11, no. 2 (2010-2011): 557-595. Alternatively for a collection of reflections on the role of history in international legal analysis, see M. Craven, *et al.* (eds.), *Time, History and International Law*. Leiden: Martinus Nijhoff Publishers, 2007.

[51] I. Braverman, *et al.*, *The Expanding Spaces of Law: A Timely Legal Geography*. Stanford University Press, 2013: 1.

in this ongoing development. Before this "spatial turn*",* phenomena were explained either in socio-temporal isolation/abstraction, or their inner contingencies were revealed by the application of a historical sensibility.[52] Space was seen as detached from socio-temporality, as "an emptiness to be 'filled up' by people and things."[53] In addition, this physical "emptiness" was coupled by its "mental" or "abstract" equivalent, which consistently acted as the space of subjective ideas, utopias and dreams.[54] It is this conception of space that I associate with the socio-spatial logic of *logos*. In other words, *logos* as a mode of analysis, is characterised by a conceptual distinction between space and society, coupled with understanding law as fixed and detached in relation to society and space.

Lefebvre's theory of *The Production of Space* was instrumental in highlighting the intrinsic connection between society and space.[55] This theory initiated an important trend in

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[52] The later 19th century and the twentieth century saw an important transition in the intellectual sensibility of the social sciences. Especially with the rise of the Marxian critique of Hegelian philosophy, and the emergence of historical materialism, critical schools of thought developed around specific conceptions of *materiality* and *temporality* in order to theorise social and political phenomena away from historicism towards a materialist conception of history. Amongst the most notable schools of thought is the Frankfurt School (comprised of many distinguished scholars across range of time). One could point to the influential contributions of thinkers such as Walter Benjamin and Max Horkheimer as examples of reflection on the then recent historical sensibility. See for example, W. Benjamin, "Theses on the Philosophy of History." In *Illuminations*, by Walter Bejamin, edited by Hannah Arendt, translated by Harry Zohn, 253-264. New York: Schocken Books, 1968; M. Horkheimer, *Critical Theory: Selected Essay.* New York: The Continuum Publishing Company, 2002.

[53] J. E. Cohen, "Cyberpace as/and Space." *Columbia Law Review* 107, no. 1 (January 2007): 227. This way of thinking about space was influenced by important thinkers such as Euclid, Descartes and Newton. An in depth analysis of the kind of spatiality theorised by the aforementioned thinkers is outside the scope of this chapter. It suffices to say that Euclid presented Western thought with a way of analysing the physical world. In turn, it was Descartes which provided us with a codified way of measuring the location and distance of objects. Finally, it was Newton who, through his concept of *absolute space*, associated change with time and stasis with space, and theorised the all important distinction between time and space which until very recently informed much of social theory. See generally, M. R. Curry, "Discursive Displacements and the Seminal Ambiguity of Space and Place." In *The Handbook of New Media*, edited by Leah Lievrouw and Sonia Livingstone, 502-517. London: Sage Publications, 2002.

[54] See generally, E. Soja, "Postmodern Geographies and the Critique of Historicism." In *Postmodern Contenstions: Epochs, Politics, Space*, edited by John P. Jones, Wolfgang Natter and Theodore R. Schatzki, 113-136. New York: The Guilford Press, 1993.

[55] H. Lefebvre, *The Production of Space.* Oxford: Blackwell Publishers, 1991.

challenging the physical(material)/mental(discursive) binary of space.[56] He argued that spaces are the products of processes which include physical, mental and social relations;[57] in his famous words, "*(social) space is a (social) product."*[58] Lefebvre saw space as much a product of material practices, as it is a product of discursive relations of (socio-spatial) production. Despite this insight, space and society still remained in a relation of *production and constitution,* rather than *co-production and co-constitution.*[59] In other words, even though a relation of production is acknowledged between the two, space and society were treated as distinct.

Building on the legacy left behind by Lefebvre, I build on the work of three important scholars of space, namely Foucault, Massey and Delaney. What these thinkers share is an approach to space that reflects on the fluid and complex relation between space and society (and by extension law). For instance, Delaney argues that social space is continuously reproduced and transformed through *how* it is performed. He spells out his theory of space and its relation to law, arguing that the field of law and geography is facing an "impasse".[60] Delaney characterises this impasse as a continuing divide between

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[56] Edward Soja pointed to the existence of these binaries, and associated them with the "modern" perspectives on space and society. For his influential critique, see E. Soja, *Post-Modern Geographies: The Reassertion of Space in Critical Social Theory.* London: Verso, 1989; *and* E. Soja, "Postmodern Geographies and the Critique of Historicism." *Supra* note 54.

[57] D. Saco, *Cybering Democracy: Public Space and the Internet.* London: University of Minnesota Press, 2002: 2.

[58] H. Lefebvre, *The Production of Space. Supra* note 55: 26.

[59] My understanding of co-production is also inspired by Shiela Jasanoff's Science and Technology Studies terminology. According to Jasanoff, "co-production is shorthand for the proposition that the ways in which we know and represent the world (both nature and society) are *inseparable* from the ways in which we choose to live in it. Knowledge and its material embodiments are at once products of social work and constitutive of forms of social life [...]." See S. Jasanoff, "The Idiom of Co-Production." In *States of Knowledge: The Co-Production of Science and Social Order*, edited by Sheila Jasanoff, 1-12. London: Routledge , 2004: 2. [Emphasis added] Even though my work is not a Science and Technology project, I find the concept of co-production extremely valuable in thinking about the relationship between law, space and society. An important scholar who questioned Lefebvre idea of "production" was Soja. For his critique of Lefebvre's theory of production of space, see E. W. Soja, "The Socio-Spatial Dialectic." *Annals of the Association of American Geographers* 70, no. 2 (1980): 207-225.

[60] D. Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations.* New York: Routledge, 2010: 12.

physical and abstract conceptions of space. Moreover, according to Delaney, other binaries, most importantly law/space and material/discursive, are preventing legal geography from "connecting the physical and the mental with the social or lived character of space" and providing "an account of how space [...] is produced through human agency."[61] Delaney's attempt at creating this *connection* is crucial to the theory of *nomos* (developed in detail in chapter three), and hence, plays an important role in the re-description of the relation between cyberspace and international law as a non-territorial experience of international sociality.

What is evident with these thinkers is that space and society are seen as inseparable. This inseparability is arguably the result of theories which characterise space as neither purely physical (material), nor mental (discursive). These theorists offer a theory of space as always already in a process of fluid co-constitution with the material and the discursive, hence becoming one (or at least inseparable) with social life and experience, imagined as a multiplicity of performative acts, relations and spaces.[62]

The theorists of space who view society and space as co-constituted and inseparable are particularly important in this thesis for two reasons. First, they are crucial for the way I characterise cyberspace as an experienced and lived space which co-produces everyday non-territorial socialities. This characterisation is informed by scholars such as Dianna Saco, Julie E. Cohen, and Massey who see cyberspace as not *just* a product,[63] but instead inherently involved in producing and transforming other spatialities, subjectivities and

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[61] Chris Butler quoted by Delaney, *ibid.* For other analyses of the problematic nature of the law/space relation see, for example, N. Blomley, "From 'What?' to 'So What?': Law and Geography in Retrospect." In *Law and Geography*, edited by Jane Holder and Carolyn Harrison, 17-33. Oxford University Press, 2003.

[62] In this reflection I am borrowing multiplicity from Massey and theories of the performative nature of space and society from Delaney, which I expand on in chapter 3.

[63] Richard Ford also alludes to the idea of cyberspace as a product. See R. T. Ford, "Against Cyberspace." In *The Place of Law*, edited by Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey. Michigan: The University of Michigan Press, 2003: 178, note 8.

socialities.[64] This way of describing the spatiality of cyberspace, moves away from theories that either characterise cyberspace as a space by relying on territorial/bordered metaphors,[65] or deny it any spatiality altogether.[66] The socio-spatially co-constituted and experienced view of cyberspace also allows one to look at content not just as filling a "container-like" space, but as part of a socio-spatiality which is neither experienced as purely material, nor completely virtual: much like Marko, Zaynab, or Arash's experience of cyber socio-spatiality described above. This is the socio-spatial framework through which I seek to demonstrate the role of cyberspace in international law scholarship away from discourses of detached regulation and control, but rather critical engagement and reflection.

Second, by viewing cyberspace as such, coupled with the insights of critical legal geography, our everyday experiences of cyberspace become part of a much larger non-territorial social space shared by an increasing number of people around the world. This is in stark contrast to the rather common position of international lawyers, offered by the opening sentence of Antonio Cassese's *International Law*, which states that "*we all live within* the framework of national legal orders."[67] By conceptualising everyday socio-spatial experiences in people's lives non-territorially (i.e. not necessarily conceivable as happening *within* the territorial framework of a national legal order), this understanding of cyberspace prompts a re-consideration of the "international". In other words, the re-description of cyberspace is presented as a cause to problematise the assumed territoriality of the international socio-spatial order.

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[64]D. Saco, *Cybering Democracy: Public Space and the Internet.* London: University of Minnesota Press, 2002; J. E. Cohen, "Cyberpace as/and Space." *Columbia Law Review* 107, no. 1 (January 2007): 210-256; D. Massey, *For Space.* London: Sage Publications Ltd, 2005: 90-98.

[65] See especially, D. R. Johnson, and D. Post. "Law and Borders: The Rise of Law in Cyberspace." *Stanford Law Review* 48 (1996): 1367-1402.

[66] See for instance, J. L. Goldsmith, "Against Cyberanarchy." *University of Chicago Law Review* 65, no. 4 (1998): 1119-1250; *and* A. R. Stein, "The Unexceptionalist Problem of Jurisdiction in Cyberspace." *International Lawyer* 32 (1998)

[67] A. Cassese, *International Law.* 2nd. Oxford: Oxford University Press, 2005: 3.

## *International law and space*

My contributions regarding the relationship between international law and space builds on an already existing, yet limited, scholarship on the topic.[68] Indeed, space has always been an important topic of analysis for international lawyers, especially since the whole field, at least in its "traditional" sense, revolves around conceptions of jurisdiction and legality directly (or indirectly) authorised by the territorial and bounded nature of states as the subjects of international law.[69] However, a move parallel to the spatial turn of social theory (post-Lefebvre), i.e. moving away from the fixity of space and recognising its social/produced character, is at its nascent stages in international law. For example, authors such as Pahuja, point to the fact that space is something that is part of the fundamental conditions of international law produced through the operations and development of international law itself.[70] By treating space as something which is "produced*",* contemporary scholars pose a challenge to the predominant views regarding the "pre-existence" of some conditions.

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[68] For two influential Feminist reflections on the spatiality of international law, see Z. Pearson, "Spaces of International Law." *Griffith Law Review* 17, no. 2 (2008): 489-514; Z. Pearson, "Feminist Project(s): The Spaces of International Law [hereinafter "Feminist Project(s)"]." In *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?*, edited by Sari Kouvo and Zoe Pearson, 47-68. Oxford: Hart Publishing, 2011; *and* D. Buss, "Austerlitz and International Law: A Feminist Reading at the Boundaries [hereinafter "Austerlitz"]." In *International Law: Modern Feminist Approaches*, edited by Doris Buss and Ambreena Manji, 87-104. Oxford: Hart Publishing, 2005. For a remarkable TWAIL oriented approach to spaces of international law, see T. Mahmud, "Geography and International Law: Towards a Postcolonial Mapping." *Santa Clara Journal of International Law* 5, no. 2 (2007): 525-561. See also, C. Landauer, "Regionalism, Geography, and the International Legal Imagination." *Chicago Journal of International Law* 11, no. 2 (2010-2011): 557-595.

[69] For a recent account of the intersection of geography and international law, see D. Bethlehem, "The End of Geography: The Changing Nature of the International System and the Challenge to International Law." *The European Journal of International Law* 25, no. 1 (2014): 9-24. See also Koller's response to Bethlehem's piece, D. Koller, "The End of Geography: The Chaning Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem." *The European Journal of International Law* 25, no. 1 (2014): 25-29.

[70] See S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* . Cambridge: Cambridge University Press, 2011.

Amongst international law theorists, feminist and TWAIL scholars have absorbed a spatial sensibility for critique more than others.[71] Inspired by the need for criticising and opening up the power dynamics behind fundamental categories and characteristics of mainstream international law, these scholars have taken on spatial analysis (sometimes in parallel to historical analysis) as a method of critique. For examples, in *Spaces of International Law,* Zoe Pearson aims at "reimaging[ing] the conceptual borders of the discipline and scholarship to include particular spaces within our conceptions of international law."[72] Pearson emphasises the "mutual constitutive nature of law, space and society,"[73] and argues that:

> The concept of space assists these critical endeavours [critical scholarship in international law] because of the rich, multidimensional and dynamic picture it suggests of how the spaces of international law are perceived, conceived and lived, and how the spaces of international law must be understood as being made up of each of these dimensions.[74]

In addition to Pearson, scholars including Carl Landauer and Tayyab Mahmud point towards the spatial component of our legal imagination and the narratives of international law.[75] Others, such as Ruth Buchanan, engage with questions of space in international law as a direct response to the dominant narratives of globalisation.[76] However, with the exception of a few, including Pearson and Doris Buss, scholars

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[71] See note 68 above.

[72] Z. Pearson, "Spaces of International Law." *Supra* note 68, at 489.

[73] Z. Pearson, "Feminist Project(s)." *Supra* note 68, at 66

[74] Z. Pearson, "Spaces of International Law." *Supra* note 68, at 508. I am in general agreement with Pearson over the significance of space in critical analysis. However, I depart from the analysis in the way that she still characterises social spaces within specific bounded spaces, whereas I seek to use cyberspace as a fluid spatiality which is non-territorial and made into a space through our experiences and social interactions.

[75] C. Landauer, "Regionalism, Geography and the International Legal Imagination." *Supra* note 68, at 595. (Arguing for attention to be paid to the parallel operations of spatiality and temporality in the operations of international forces and "the local's own layers of past interactions, intrusions, and assimilations."); T. Mahmud, "Geography and International Law: Towards a Postcolonial Mapping." *Santa Clara Journal of International Law* 5, no. 2 (2007): 525-561.

[76] See, for instance, R. Buchanan, "Border Crossings: NAFTA, Regulatory Restructuring, and the Politics of Place." In *The Legal Geographies Reader: Law, Power, and Space*, edited by Nicolas Blomely, David Delaney and Richard T. Ford, 285-297. Oxford: Blackwell Publishing, 2001.

seldom direct their spatial analysis to the concept of the "international", challenging it using the socio-spatial experiences and practices of everyday.

By accepting the fluidity of space and law, Pearson seeks to critically reflect on the normative spaces of international law, which broadly aligns with the intention of this thesis. However, a familiar territorial logic of space (embedded in the concept of *logos*) still brings the attention of these insightful scholars back to societal contexts in which law operates and which are often characterised in terms of physical (territorial) spatial contexts such as "the local" or "the (global) city". On the contrary, theorists such as Buss, seek to do the exact opposite by arguing for "a reading of 'the international' of international law as reflecting 'ideas about what is right, just and appropriate'."[77] Yet, both their approaches to space still fall victim to the limited territorial socio-spatial configuration of the "international" in international law, since they reach out to either physical or mental space in order to make the bridge to the everyday life of the "international". In this thesis, I identify that the perspectives provided by the spatial critics of the "international", tend not to make room for lived spaces which are neither local, nor ideational but are fundamentally international, a sensibility already explored through cyberspace. In other words, this thesis uses the conception of space exemplified through cyberspace as a theoretical method for offering a critique of the predominant conceptualisations of international law's social-spatial fabric, the "international".

### *1.2.3. On International Law and Social Movements*

I use social movements and their place in international legal literature as a way of illustrating the importance of accommodating the non-territorial socialities of everyday

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[77] D. Buss, "Austerlitz." *Supra* note 68, at 88. Buss is quoting T. Cresswell's, *In Place/Out of Place: Geography, Ideology, and Transgression.* Minneapolis: University of Minnesota , 1996: 8.

life in international legal thought.[78] I do this by exploring the overlap between the connection drawn between international law and social movements by SMIL, and the indispensible role the Internet (and the socio-spatial experience and life of cyberspace) plays in contemporary social movements. What I seek to demonstrate is to see how a shift in our analytical frameworks of socio-spatiality of the "international", by extension of cyberspace, will affect the frameworks of engagement with social movements for international law. In order to do so, I will provide a short overview of the literature on SMIL.

Julie Mertus, in her review of SMIL literature, sees social movements as either "spurring international law" or "spurning it."[79] In this view, international law is either opposed (e.g. anti-globalization campaigns) or promoted (human rights and/or development oriented action(s)) by social movements around the world. As such, the relationship becomes limited to the way international law serves (or does not serve) social movements' goals and purposes. Others however, take a more reflective position with regards to this relationship by analysing the "conceptual role of social movements" for international law.[80] In doing so, similar to the trend in other forms of critical social/legal theory (and in international law), a number of scholars, including Neil Stammers,[81]

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[78]Diani defines social movements as "networks of informal interaction between a plurality of individuals, groups and/or organizations, engaged in a political or cultural conflict on the basis of a shared collective identity." See M. Diani, "The Concept of Social Movement." *The Sociological Review* 40, no. 1 (1992): 13. These forms of informal interactions take different forms and are classified into categories depending on characteristics such as membership, geographical distributions, agenda or collective identity. What I am particularly intersted in are contemporary social movements, for whcih cyberspace is a central component.

[79] J. Mertus, "International Law and Social Movements: Towards Transformation: Analyzing Social Movements and Internationl Law." *American Society of International Law Proceedings* 97 (2003): 295.

[80] E. Rubin, "The Conceptual Role of Social Movements." *Amercian Society of International Law Proceedings* 97 (2003): 296-299.

[81] N. Stammers, "Social Movements and the Social Construction of Human Rights." *Human Rights Quarterly* 21, no. 4 (1999): 980-1008. See also N. Stammers, "Social Movements, Human Rights, and the Challenge to Power." *American Society of International Law Proceedings* 97 (2003): 299-301.

Vasuki Nesiah[82] and Buchanan[83] promote a socio-*historical* approach, in order to highlight the role of time/history in the development of the conceptual link between social movements and international law. In the illustration of my thesis, I particularly focus on the scholarship of Rajagopal as the pioneering scholar of SMIL, who arguably offers a combination of the above analyses.[84]

What all SMIL scholars share is an attempt to destabilise the state/institution oriented narrative of the socio-legality of international law and consequently challenge both the sociality and spatiality of international law. Providing a counter-narrative to the mainstream accounts of international law through social movements is important for SMIL and my thesis, since it imagines an active role for people, individuals and their sociality (often in their collectivity), rather than a passive role as "bearer[s] of human rights."[85] SMIL scholars think of social movements as an important part of the international normative structure, a role that according to scholarship should be acknowledged. Through illustration of the overlap of social movements and cyberspace, I argue that the SMIL critique can/should be taken a step further, in order to challenge the socio-spatial framework (of *logos*) in the context of which social movements are being embedded.

Given the centrality of communications to social movements, it is no surprise that there is a huge and growing scholarship examining the effects of the Internet on the operations of social movements. Even though since the early 2000s the Internet has

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82 V. Nesiah, "Resistance in the Age of Empire: Occupied Discourse Pending Investigation." *Third World Quarterly* 27, no. 5 (2006): 903-922.
83 R. Buchanan, "Writing Resistance into International Law." *International Community Law Review* 10 (2008): 445-454.
84 For Rajagopal's most influential contributions to the field of SMIL, see B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistence* [hereinafter *"International Law from Below"*]. New York: Cambridge University Press, 2003. See also B. Rajagopal, "Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy." *Third World Quarterly* 27, no. 5 (2006): 767-783.
85 L. F. Damrosch, *et al., International Law: Cases and Materials (4th Edition).* West Group, 2001: xv.

proven to be an important tool for communication for many, it is really in the past five or six years, that activism and the Internet (especially "social media") have become virtually inseparable. The Internet has added to the "repertoire of collective action" for social movements, old and new, domestic and global.[86] Scholars have in the past few years paid close attention to the possibilities and limitations of the Internet mainly as a "tool" which is both enabling new forms of collective action (e.g. online petitions, online discussion forums, etc.) and enhancing the scope of possibilities for more traditional forms (e.g. allowing faster spread of information and increased awareness, organisation of simultaneous protests at different locations, etc.).[87] One of the most prominent scholars of the "information age" is Manuel Castells, who in his analysis of the recent social movements, argues that the Internet "made possible the viral diffusion of videos, messages and songs that incited rage and gave hope" to social movements in a variety of circumstances.[88] Put in the vocabulary of this project, it is the non-territorial and fluid (both in terms of form and content) forms of (cyber) sociality that were key to the realisation of "hope". It is this quality of many contemporary movements that I seek to find access to, and incorporate in SMIL and international law more broadly.

Rajagopal announces that "international law simply does not have the theoretical framework or doctrinal tools to make sense of [the complex reality of globalization and resistance to it]," which are thought to be "emerging along different spatial orderings."[89] It is exactly by further demonstrating this gap that I am directing my critical framework

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[86] Charles Tilly defines the "repertoire of collective action" as the "set of means which is effectively available to a given set of people." See C. Tilly, "Social Movements and National Politics." *Centre for Research and Social Organization Working Paper* 197 (1979): 15.

[87] See for example, J. Van Laer, and P. Van Aelst, "Internet and Social Movement Action Repertoires: Opportunities and Limitations." *Information, Communication and Society* 13, no. 8 (2010): 1146-1171.

[88] M. Castells, *Networks of Outrage and Hope: Social Movements in the Internet Age.* Cambridge: Polity Press, 2012: 28.

[89] B. Rajagopal, *International Law from Below. Supra* note 84, at 270.

at the "international" through considering the non-territorial socio-spatiality of cyberspace as *nomos,* which is conceptually significant for international legal critique.

## 1.3. Outline of the Thesis

Having provided the theoretical and methodological backdrop for the discussion of my thesis, I will now provide an outline of the thesis chapter by chapter. Given the central role of cyberspace to the argument, in the second chapter, through a largely descriptive/historical method, I discuss the current/predominant relationship between law and the Internet, with a particular focus on international law. I highlight that the role of international law in this story is rather ambivalent and at best limited to offering a possible remedy for the regulatory difficulties faced by individual states. Through this chapter, I point to the absence of a socio-spatial engagement with the Internet (infrastructure (form) and content) by international law. As I will highlight, international legal engagement with cyberspace is often shorthand either for technology or the space containing content in need of regulation.

In the third chapter, I elaborate on and construct an understanding of two common frames of analysing and thinking about law, *logos* and *nomos*. These two concepts serve as the central frameworks of my critique, namely, of cyberspace (and international law), the "international" and social movements. Drawing on the historical development of these concepts, I initially construct a conceptual image of *logos* as an attitude which is associated with the fixity of law (authority) outside the social and spatial context, while seeing space through the binary of physical/mental spatiality. In this mode of analysis, sociality only happens "within" the boundaries of physical space (by entities with an identifiable "body"). In contrast, I define *nomos* as a diametrically different concept to *logos* in its conceptualisation of law, space and society. By reading the scholarship of Carl Schmitt and Robert Cover, in light of the insightful reflections of critical (legal)

geography, I develop *nomos* to provide a conceptual framework where law, space and society are not categorically distinct, but forming a fluid multiplicity through which they are co-produced. *Nomos* in fact *becomes* this co-production.

In the fourth chapter, given the background provided to the different ways of conceptualising the relation between the "legal*",* the "spatial" and the "social*",* I revisit cyberspace and international law's predominant engagement with it. Initially, I observe that this engagement reflects the characteristics of *logos*. Accordingly, international law is seen as detached from the form and content of the Internet, yet the non-territoriality of cyberspace as a social experience is ignored. In the remainder of the chapter, using the insights of Delaney, Foucault and Massey, I (re-)describe cyberspace as *nomos,* emphasising the non-territorial and lived social spaces of using and interacting through the Internet.

The (re-)description of cyberspace demonstrated in the fourth chapter, acts as the central element of the critique I pose at the understandings of socio-spatiality predominant in international law, a topic to which I turn my attention in the fifth chapter. In this chapter, I analyse the predominant ways international law conceptualises the socio-spatial fabric of the "international". Having gone through different perspectives, I demonstrate that the "international" is either seen territorially or abstracted away into a "space-less" realm, with an absent sociality. I associate this duality with the physical/mental binary of *logos,* and I proceed to highlight the way this duality is hardwired even into the most critical accounts of the indeterminacy of the international legal argument.

Having elaborated the main elements of my thesis through an analysis of cyberspace and pointed out the territorial configuration of the "international", I proceed to the sixth chapter, where I further illustrate the importance of *nomos* as a mode of analysis.

By pointing to the socio-spatial narrative of SMIL, especially the common reliance on categories such as "from below" and the "local" in producing critique, I highlight analytical continuities with *logos* in SMIL literature. I argue that by shifting to *nomos,* the territorial configuration of the "international" at the heart of SMIL will be fundamentally disrupted. As I demonstrate, this disruption is necessary and timely, if SMIL is to capture the nuances of contemporary social movements and their role in the co-production of the broader socio-spatial fabric of the "international".

Finally, in the concluding chapter, I first explore the further potentials and consequences of my thesis for the ways in which the sociology of international law is understood and perceived. Further, I reflect on how a re-consideration of international sociality affects the long standing emancipatory dreams often attached to international law. To conclude, I consider how my attempt at bringing seemingly disparate forces and ideas together in this project, may prompt and require the critical international lawyer to revise her research agenda beyond the boundaries – spatial and temporal – imposed on the discipline.

# Chapter 2 – Regulation of the Internet and International Law

*The scholarly debate over the proper regulatory approach to cyberspace reflects not richness but poverty of imagination.*

*J.E. Cohen*

## 2.1. Introduction

It is the central goal of this chapter to provide an account of the range of legal engagements that have materialised since the beginning of the commercialisation of the Internet.[1] I would like to highlight and contextualise the so far limited and controversial role of international law in the wider context known as "Internet governance". In this process, I consider both institutional and intergovernmental forms of international law. As the Internet and its role in our day to day lives expanded rapidly through time, so did the numerous institutions and legal (and quasi-legal) bodies involved in governing and regulating this phenomenon. Therefore the best way of engaging with these governing mechanisms is to put them in their historical context. Hence it is essential to undertake a historical approach. This will provide a descriptive image of the changing/developing relationship between law and the Internet across time, and allows me to situate the difficult role of international law in a wider institutional and legal context.

As I will explain further in the final section of this chapter, international law is increasingly being seen as the solution to a number of Internet governance issues. Even though most of these issues are content related, international law (in its traditional inter-

[1] The Internet specifically refers to the network of computers and servers which is enabled through networking protocols such as TCP/IP, through a wider, decentred interconnected telecommunications structure. See appendix for the discussion of the formation of the Internet and its characteristics.

governmental forms) is sought in order to ensure more control over the Code and infrastructure of the Internet for territorial states. This is despite the fact that most regulation of the Internet is national.

Before proceeding to the discussion of this chapter, I should note that law (at least in its traditional state oriented sense) and the Internet have always had an uncomfortable relationship. Lawyers and legal scholars from the early days of the widespread availability of the Internet[2] have faced difficulties regarding the regulation of the Internet because of the cross border availability of information and data. While some dismissed the legitimacy and possibility of state regulation of the Internet and called for exceptional legal treatment of cyberspace (known as cyber "exceptionalists"),[3] many others argued for the applicability of domestic law to the Internet (content) with the help of conflict of laws principles (known as cyber "non-exceptionalists").[4] It is important to consider the content of this chapter, and arguably my further analysis of cyberspace, within the context of the running debates regarding the possibility, feasibility and desirability of regulating the Internet.[5] However given that this thesis is

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[2] For a brief history of the Internet see Appendix 1.

[3] A classic exceptionalist approach to cyberspace is J. P. Barlow, *A declaration of the Independence of Cyberspace*. February 8, 1996. https://projects.eff.org/~barlow/Declaration-Final.html (accessed 1 August 2012). Exceptionalist literature on cyberspace governance includes D. R. Johnson, and D. G. Post, "Law and Borders: The Rise of Law in Cyberspace." *Stanford Law Review* 48 (1996): 1367-1402; and D. G. Post, "Against "Against Cyberanarchy." *Berkeley Technology Law Journal* 17 (2002): 1-23; D. G. Post, *In Search of Jefferson's Moose: Notes on the State of Cyberspace*. Oxford: Oxford University Press, 2009; H. H. JR. Perritt, "The Internet is Changing the Public International Legal System." *Kentucky Law Journal* 88 (2000); J. R. Reidenberg, "Governing Networks and Rulemaking in Cyberspace." *Emory Law Journal* 45 (1996): 911-930. For an influential pro-regulation yet exceptionalist perspective on law and cyberspace see L. Lessig, *Code: Version 2.0*. New York: Basic Books, 2006.

[4] For influential non-exceptionalist literature, see J. L. Goldsmith, "Against Cyberanarchy." *University of Chicago Law Review* 65, no. 4 (1998): 1119-1250; A. R. Stein, "The Unexceptionalist Problem of Jurisdiction in Cyberspace." *International Lawyer* 32 (1998); J. L. Goldsmith, "Regulation of the Internet: Three Persistent Fallacies." *Chicago-Kent Law Review* 73, no. 4 (1998): 1119-1132; *and* J. L. Goldsmith and T. Wu. Who Controls the Internet?: Illusions of a Borderless World. New York: Oxford University Press, 2006.

[5] For an insightful overview of these debates see D. R. Johnson, *et al.,* "The Accountable Internet: Peer Production of Internet Governance." *Virginia Journal of Law and Technology* 9, no. 9

ultimately not about Internet regulation, I will not be expanding further on these debates.

I proceed with the content of this chapter in the following way. In the first section I focus on the early development of regulatory and legal forms with regard to the Internet (mid 1980s to 1998). Given that this was pre-commercialisation and pre-mass access, most of these governance structures concerned themselves with standardisation and the development of network infrastructures, with the emergence of content regulation as a legal issue towards the end of the period.

The second section of the chapter considers the development of new models of Internet governance which, since the establishment of the Internet Corporation for Assigned Names and Numbers (ICANN), became largely characterised by multistakeholderism. The period under consideration (1998-2014) saw an expansion of regulatory frameworks on the national and international levels. Most significantly, multistakeholderism was consolidated through international organisations, such as the UN, as the central method of international Internet governance. Moreover, this period saw the birth of treaty regimes concerned with content regulation.

In the final section I will consider the current period as a time of increasing uncertainty regarding the future of Internet governance. On the one hand there has been an expansion of the multistakeholder framework in parallel with national regulation of Internet content, and on the other hand I point to increasing dissatisfaction with the multistakeholder approach and louder calls (mainly by developing countries) for an intergovernmental regulatory regime.

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(2004): 1-33. For a recent defence of the exceptionalist approach see D.G. Post, *In Search of Jefferson's Moose: Notes on the State of Cyberspace. Supra* note 3.

I will conclude this chapter by observing that the international legal engagement with the Internet in all of its forms is most often regulatory, and that the significance of non-territorial human interaction, communication and social associations through the Internet are largely ignored – with the exception only of what is referred to as "content regulation". The discourse of international law predominantly focuses on the Internet as this allows international lawyers to deal with technology and content separately for regulatory purposes. The place/role of international law in relation to cyberspace is largely seen through dealing with "new technology",[6] and content seen as some*thing* filling cyberspace, something to be dealt with largely through the language of criminal law through the mechanisms of treaty making and state implementation.[7] The observations of this chapter are crucial for the wider project since the remainder of this analysis reflects further on the relationship between international law and the Internet (sometimes also referred to as "cyberspace" but rarely going beyond the Internet) from a theoretical perspective, seeking to provide international law with a theoretical framework that enables it to recognise or comprehend the non-territorial character of social relations enabled through the Internet and experienced as cyberspace.

## 2.2. Birth of "Internet Governance": Mid 1980s to 1998

From the mid-1980s to the late 1990s, the Internet underwent a transitional period. Institutional hierarchies, private ownership and internationalisation changed the face of this technological phenomenon from a site/tool of research, innovation and geeky conversations, to a sought after, largely privatised global technology available to the mass public, subject to growing governance and regulation. In this section I would like

[6] See for instance M. Land, "Toward and International Law of the Internet." *Harvard International Law Journal* 54, no. 2 (2013): 393-458.
[7] See for instance Council of Europe Convention on Cybercrime [2001] ETS 185.

to trace this development which occurred on a dichotomous basis, focusing on infrastructure and Code on the one hand, and content on the other.

Initial developments of governance mechanisms were generally concerned with the physical and the "logical" layers (infrastructure and Code), the content layer only becoming important towards the end of the 10-15 year period discussed in this section.[8] Here I would like to focus firstly on the former two layers. This is because it was the innovations (both technological and in terms of governance) of these two layers that initially distinguished the Internet from previous telecommunications tools (television, telegraph or telephone), as a result making many-to-many communication possible on a scale that eventually required governance of the content layer as well.

In the early days of the Internet, the term "governance" was used to refer to the technical management, coordination and control of the structure and standards of this "network of networks", and name/number assignment, in addition to the all important forms of online community governance. The term "governance" was used instead of "government" because states (with the clear exception of the US) had very little role in it, and it was mainly the academic research community who took a leading role in the development of the technology and its relevant standards. Even the role of the US government is still questionable and the topic of many debates.[9] As is clear from the disagreements between important academics such as Jon Postel and the US Department

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[8] Yochai Benkler introduces the idea of 'layers' of Internet communications in *Wealth of Networks*. He suggests three layers: the physical layer, the logical layer, and the content layer. The former two include the technical and software aspects of communications. The latter (content layer) is defined as "the set of humanly meaningful statements that human beings utter to and with one another." See Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. London: Yale University Press, 2006: 392. See also J. Kulesza, *International Internet Law*. Translated by Magdalena Arent and Woloszyk Wojciech. New York: Routledge, 2012: 125-126.

[9] See J. L. Schenker, "Nations Chafe at U.S. Influence Over Internet." *The New York Times*. 8 December 2003. http://www.nytimes.com/2003/12/08/technology/08divide.html (accessed August 9, 2014). See also M. Muller, "Who Owns the Internet? Ownership as a Legal Basis for American Control of the Internet." *Fordham Intellectual Property, Media and Entertainment Law Journal* 15, no. 3 (2005): 709-748.

of Commerce (DoC) in the 1990s, the research community were rarely following orders from the government officials.[10] In fact the Advanced Research Projects Agency's (ARPA)[11] success in operationalising ARPANET was partly due to the autonomy given to them by the Department of Defence (DoD) at the beginning of their research.[12] In this period, the meaning of Internet governance carried on its "management", "coordination" and standardisation theme, with the addition of national and international (inter-state) regulation of content towards the mid 1990s.

### *2.2.1. Infrastructure, Networks and Standards*

Until the mid 1980s the technical and infrastructural governance was mainly performed by academics and researchers involved in the ARPANET project though circulated documents called Request for Comments (RFCs).[13] These documents were responses to specific problems emerging through use and the governance system was largely ad-hoc.[14] Although the form of standards and Code governance remained mostly ad-hoc for some years to come, probably the first seed of institutionalisation of standard setting, albeit informal, was the formation of the Internet Engineering Task Force (IETF), which to date remains the most important standard setting body for the Internet.[15]

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[10] For an account of such disagreements especially regarding management of the domain name level which eventually led to the establishment of the Internet Corporation for Assigned Names and Numbers (ICANN), see W. Kleinwachter, "The History of Internet Governance." In *Governing the Internet: Freedom and Regulation in the OSCE Region*, edited by Christian Moller and Arnaud Amouroux. Vienna: Organisation for Security and Co-operation in Europe, 2007: 46-50.

[11] The name of ARPA was changed to Defence Advanced Research Projects Agency in 1972.

[12] M. Castells, *The Internet Galaxy: Reflection on the Internet, Business, and Society* [hereinafter *"Internet Galaxy"*]. New York: Oxford University Press, 2001: 31. Of course the other part being the flow of funding made available to the researchers and developers.

[13] The first RFC's were used in 1969. These documents would then become technical standards through the Network Working Groups (NWG), which was later disbanded in 1970s after ARPANET became operational.

[14] M. Castells, *Internet Galaxy*. *Supra* note 12, at 31.

[15] I should however emphasise here that IETF is by no means the only standard setting body for the Internet. Given the many aspects of Internet Code governance, from applications such

IETF was founded in 1985 under the umbrella of The Internet Advisory Board (IAB) established in 1984 (later changing to the Internet Activities Board, and finally changing to the Internet Architecture Board in 1992).[16] This task force was open to anyone and practiced decision making on a rough consensus basis amongst the engineers and researchers involved. An often quoted phrase by one of the early participants regarding their approach to standard setting and governance is: "We reject kings, presidents and voting. We believe in rough consensus and running code."[17] This quote embodies important aspects of the ethos of the pioneers of the Internet who were involved in its governance from the beginning. Orly Lobel describes IETF as "an unincorporated association with constantly changing members, [which] operates to set standards through negotiations open to all."[18] IETF receives comments on their technical proposals from bodies such as the Internet Engineering Steering Group (IESG) and of course the Internet Architecture Board (IAB).[19]

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as the World Wide Web, to the telecommunications infrastructure needed for the operations of international network, other organisations such the International Telecommunications Union, and the World Wide Web Consortium (W3C) are in constant liaison regarding different aspects of their governance endeavours.

[16] The IAB was started in 1994 from another bottom up standard setting board established in 1979 called "Internet Configuration Control Board" (ICCB). Similar to the ICCB, the IAB was made up of "engineers and other groups involved in the development of the Internet at that time." See generally W. Kleinwachter, "The History of Internet Governance." *Supra* note 10, at 44. Currently IAB is "composed of twelve members selected by the IETF Nominations Committee, the IETF Chair (also selected by the IETF Nominations Committee), and several ex-officio and liaison positions." For details see http://www.iab.org/about/iab-members/ (accessed August 9, 2014).

[17] See M. Ziewitz and I. Brown. "A Prehistory of Internet Governance." In *Research Handbook on Governance of the Internet*, edited by Ian Brown. Cheltenham: Edward Elgar Publishing Limited, 2013: 25. For a good introductory account of IETF operations within ISOC, see also P. Hoffman, "The Tao of IETF: A Novice's Guide to the Internet Engineering Task Force [hereinafter "The Tao of IETF"]." *Internet Engineering Task Force.* 2 November 2012. http://www.ietf.org/tao.html (accessed August 9, 2014).

[18] O. Lobel, "Renew Deal: the Fall of Regulation and the Rise of Governance in Contemporary Legal Thought." *Minnesota Law Review* 89 (2005): 436.

[19] According to Hoffman, "the IAB is responsible for keeping an eye on the "big picture" of the Internet, and it focuses on long-range planning and coordination among the various areas of IETF activity." See P. Hoffman, "The Tao of IETF." *Supra* note 17.

Even though the open and "bottom-up" ethos carries on until today and governmental bodies usually don't have a privileged role in the formation of Internet Code and standards, institutional hierarchies are in place in the operations of the different groups and task forces. Such hierarchies were especially formalised after the establishment of the Internet Society (ISOC) in 1992, where each body or working group was assigned a special task under the supervision of the internally appointed administrative staff and volunteers.[20] The transfer of authority to ISOC in 1992 was an important step towards international participation on standard setting and the privatisation of the institutional arrangements, even though the institutions continued to be based in the US for some time to come.[21]

Given that the Internet requires the international telecommunications framework as its physical backbone, the role of one of the oldest international organisations, the International Telecommunications Union (ITU), especially its "Standardization Sector" (ITU-T), in Internet regulation is noteworthy.[22] Through its wide ranging membership

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[20] ISOC is the international non-profit organisation in charge of the financial and legal aid for the operations of IETF, IESG, and Internet Architecture Board. For an overview of the institutional hierarchy in place within ISOC, see P. Hoffman "the TAO of IETF." *Ibid., at* Section 2.2.

[21] The IETF met in Amsterdam, The Netherlands, in July 1993. This was the first IETF meeting held in Europe, and the US/non-US attendee split was nearly 50/50. The IETF first met in Asia (in Adelaide, Australia) in 2000. Until 1995, the US government maintained most legal and financial responsibility of the Internet core resources, albeit through changing departments and institutions.

[22] ITU operates as a specialised agency of the UN, and its role in regulating international telecommunications is really important. This is especially the case since the deregulatory movement regarding the telecommunications industries, where national control over telecommunication has largely been removed internationally. See J. G. Wexler, "International Telecommunications Law in the Post-Deregulatory Landscape--Foreword." *Brooklyn Journal of International Law*, 2002: 737-738.
It is in this deregulated and denationalised framework that the role of institutions such as ITU gains importance. I should however note here that this deregulation and privatisation of telecommunications was not universal and there are exceptions to the trend. In many countries like Iran, China and Russia direct and indirect control over telecommunications has grown. For a brief overview of ITU's international vision and mandate see http://www.itu.int/en/about/Pages/vision.aspx (accessed August 9, 2014).

(including states, sectors and associates[23]), it develops "non-binding technical recommendations serving as standards within all telecommunication fields."[24] ITU's role seems to be gaining in importance in recent years, especially since the rapid growth in wireless communications, and broadband services. Yet ITU remains the only UN body with indirect regulatory control over the Internet infrastructure, a role which is often (increasingly) promoted by many state actors for increased intergovernmental control.

Since the beginning of the Internet (i.e. inter-networking of computers and networks through TCP/IP), numeric identifiers were needed for the protocols to operate, and the body in charge of their assignment was the Internet Assigned Numbers Authority (IANA).[25] In addition, the registry of the assigned addresses was performed by the Network Information Centre (NIC) at the Stanford Research Institute (SRI). By the late 1980s and the early 1990s the IANA/NIC arrangement was under a significant amount of pressure, with dramatic increases in the number of hosts connected through/to the Internet and the expansion of the Domain Name System (DNS).[26] In 1991, through a proposal by the IAB, the functions of NIC were delegated to Government Systems Inc., which in turn outsourced to a private company called Network Solutions. However the move by IAB to outsource registry to a private company was combined with probably the most important invention in the history of the Internet, the creation of the World Wide Web (WWW), which caused a great stir in the institutional arrangements within the US regarding the governance of DNS.

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[23] "Associates" refers to equipment companies and manufacturers, and ICT providers.
[24] J. Kulesza, *International Internet Law. Supra* note 8.
[25]This function was fulfilled mainly by John Postel in the Information Science Institute (ISI), under a contractual arrangement with the Department of Commerce. See V. Cerf, "IAB Recommended Policy on Distributing Internet Identifier Assignment [RFC 1174]." *IETF*. August 1990. http://tools.ietf.org/html/rfc1174 (accessed August 11, 2014).
[26] The Domain Name System is an addressing system used for turning IP addresses (which are composed of a series of numbers) into alphanumerical addresses which are easier to remember and access.

With the creation of the WWW at the European Organization for Nuclear Research (CERN) in 1990,[27] came an unprecedented potential for the Internet to be available to people's homes and businesses. Tim Berners-Lee and his associates developed the first versions of Internet browsers and Web servers.[28] Although before 1995 the number of Web servers grew gradually, the availability of the Internet backbone to private carriers caused an explosion in the number of servers from 200 in 1992 to over two million in 1999. Needless to say, with the increase in the services and information provided online, the number of users grew rapidly as well, not just within the US, but internationally.[29] With this increase in numbers came an increase in the DNS registrations, and hence an increased pressure on ISI and the newly outsourced NSI. This in turn led to more institutionalisation, as standards for further development and accessibility of this application were sought. The result was the World Wide Web Consortium (W3C), a non-profit organisation based in the US with offices around the world, which "seeks to promote standards for the evolution of the Web and interoperability between WWW products."[30] Although it is deemed "industry specific", W3C plays (to date) an important role in ensuring smooth, everyday access to the Internet as we know it.

The creation of WWW and the need for expanding the DNS led to an institutional tug of war which (albeit unsuccessfully) brought ITU and WIPO close to the uncharted

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[27] The World Wide Web is often wrongly treated as a synonym of the Internet, whereas it is an application which links documents and information available on the Internet. In other words it operates *via* the Internet. For an accessible and relatively non-technical account of the World Wide Web, in its inventor's words, see T. Berners-Lee, *Weaving the Web: The Original Design and the Ultimate Destiny of the World Wide Web*. New York: HarperCollins Publishers Inc., 2000.

[28] Web servers are the hardware and software that are used in the process of delivering content through the Internet.

[29] The number of world Internet users grew from 16 million in 1995 to 248 million in 1999. This rapid growth was due to the expansion of the "information superhighway" by a number of states during the late 1990s. For statistics on Internet user growth rates see *Internet World Stats*. http://www.internetworldstats.com/emarketing.htm (accessed August 9, 2014).

[30] A. Murray, *The Regulation of Cyberspace: Control in the Online Environment* [hereinafter *"Regulation of Cyberspace"*]. New York: Routledge-Cavendish, 2007: 88 , note 46. I should also point out that W3C was not a purely American institution and was a result of cross Atlantic cooperation between MIT Laboratory for Computer Science in the United States and the *Institut national de recherché en informatique et en* automatique in France.

territory of direct Internet governance. In 1994, Postel proposed the considerable expansion of the Top Level Domains (TLDs) under the general management of the newly established Internet Society;[31] a move which was strongly opposed by NSI and the US government.[32] Faced with a strong opposition, Postel moved to the International Telecommunication Union as a base for bringing together, a form of private-public partnership on Internet governance. This is arguably the first attempt at a multistakeholder approach to Internet governance. Yet again this move was also opposed by the US government, even though a Memorandum of Understanding (MoU) was signed by an Interim Ad Hoc Committee (IAHC),[33] through which a Policy Oversight Committee was to be in charge of management of Internet core resources. Even though the role of ITU in regulating the Internet as a traditional international legal body was short lived, the ITU secretary general saw it as a "turning point in International law."[34]

Following the US Government's move to block the IAHC's MoU, the former proposed the privatisation of the management of the Internet's core resources. The EU was also behind the US in this, even though they opposed the sole dominance of the US in this "privatisation" and argued that "international interests" should be taken into account.[35] The Green Paper proposing this privatisation had principles of stability, competition and bottom-up policy development at its heart,[36] and with Postel's support led to the

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31 Top Level Domains refer to dominant domain names such as .com, .org and .net.

32 Given that until then the management of the Root Server and the main gTLDs was given to Network Solutions Inc. (NSI), Postel's move was not welcomed by the US government. Lobbied by NSI, the DoC interfered and stopped the expansion of the gTLDs under Internet Society.

33 The Committee consisted of the ITU, IAB, IANA, ISOC, and WIPO.

34 W. Kleinwachter, "Beyond ICANN vs. ITU: Will WSIS Open New Territory for Internet Governance?" In *Internet Governance: A Grand Collaboration*, edited by Don Maclean. New York: United Nations ICT Task Force, 2004: 36.

35 See generally F.C. Mayer, "Europe and the Internet: The Old World and the New Medium." *European Journal of International Law* 11, no. 1 (2000): 149-169.

36 NTIA. "A Proposal to Improve Technical Management of Internet Names and Addresses (The "Green Paper")." *NTIA*. 30 January 1998.

establishment of the Internet Corporation for Assigned Names and Numbers (ICANN).

States were kept out of direct control over ICANN as it was conceived as a multistakeholder organisation under private sector leadership. However UN member states were given the opportunity to give advice through the medium of the Government Advisory Committee (GAC).[37] ICANN until today is primarily responsible for the standardisation of the DNS and the Internet's addressing infrastructure and as a result it holds great sway over the Internet's technical coordination and standard setting. This includes IP number and root name server system's coordination, domain dispute resolution, and "promoting fair competition at TLD level."[38] Though its decisions were (and still are) consensus based and its membership consists of non-state actors, ICANN's reputation (especially until September 2009 and the coming into force of the "Affirmation of Commitments"[39]) has been muddied by its historical links to the US government (DoC).[40] This relation has often put the transnational and non-governmental nature of this institution into question.

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http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm (accessed September 8, 2014).

[37] On the scope and scale of the GAC's work see generally ICANN. "About the GAC." *Government Advisory Committee.* https://gacweb.icann.org/display/gacweb/About+The+GAC (accessed August 9, 2014).

[38] For an overview of the organisational details of ICANN see J. Kulesza. *International Internet Law. Supra* note 8, at 128-133. See also http://www.icann.org/en/about (accessed September 11, 2014)

[39] This document is a significant step which "purports to recast the public-private relationship at the heart of the management of the domain name system ("DNS")." For an in depth analysis of this document and its effect on the state of ICANN, see M. A. Froomkin, "Almost Free: An Analysis of ICANN's 'Affirmation of Commitments'." *Journal of Telecommunications and High Technology Law* 9 (2011): 187-234.

[40] On the consensus based decision making see M.A. Froomkin, "HABERMAS@DISCOURSE.NET: Toward a Critical Theory of Cyberspace." *Harvard Law Review* 116 (2003): 756-757. For an example of the critique of US influence over ICANN see address made on 4 May 2009, by the EU Commissioner of the Information Society and Media, V. Reding, "The Future of Internet Governance: Towards an Accountable ICANN." *Internet Society: India Chennai.* 4 May 2009. www.isocindiachennai.org/?p=83 (accessed September 8, 2014).

Therefore the establishment of ICANN marked a significant point of departure from the previous efforts because of its multistakeholder and largely private organisation, with states acting only as advisers. The realisation of the unprecedented use of and participation on/in the Internet by a wide range of actors, called for a governance method whereby the stakeholders in the Internet take part in policy making processes. This approach shaped most efforts at Internet governance in the first decade of the twenty first century. However before looking at the important developments of the following decade, I shall point to the governance and regulation of Internet content, which mainly developed from mid-1990s onwards with a significant role for governmental and inter-governmental regulation.

### *2.2.2. The Emergence of Internet Content Regulation*

Prior to the commercialisation and the sudden expansion of Internet users, the limited number of active users of computer networking meant that content was largely a matter of community self-regulation. Content and online interaction was mostly governed by (rough) consensus over shared values and online communities' communications were generally (self-)regulated through what came to be known as "netiquette". Netiquette was a set of conventions amongst members interacting or contributing to online communities such as discussion forums and message boards, and whose origins could be traced back to the early days of the Internet amongst the researchers and academics. Although they were more formalised as a response to the new unfamiliar members in the early nineties,[41] norms and conventions relating to content retained their form as soft regulation.[42]

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[41] See S. Hambridge, "Netiquette Guidelines [RFC1855]." *IETF*. October 1995. https://www.ietf.org/rfc/rfc1855.txt (accessed August 11, 2014).

[42] A. Murray, *Regulation of Cyberspace*. *Supra* note 30, at 143. For an in depth analysis of community regulation and their role in the development of cyberspace see 126-164.

Even though netiquette remains important in cyberspace,[43] the widely accessible (at least within the developed world) and commercialised Internet content raised concerns amongst policy makers and scholars alike on the national and international levels. Until the end of the decade the main issues regarding content were largely related to intellectual property, harmful material and data privacy. In other words the issues of content regulation were framed by efforts first, to protect intellectual property, second, to balance free speech with the regulation of "harmful" content and third, to control access and use of personal data. These three areas of law proved to be areas where international efforts at governance and dispute resolution saw the most success in the years to come.

First, with the arrival of commercial and personal use of the Internet came a perceived need for unique domain names, and with that an increasing number of disputes over these unique names. Most of the early disputes came to be known as cases of "cybersquatting", which involves individuals or organisations registering domain names containing the exact (or similar) trademark or personal names, with the intention of selling them at a higher price (either back to the trademark owner or a third party). As a result of increasing problems with cybersquatting, courts took most of the brunt of dealing with such issues, relying mainly on running trademarks laws.[44] It was not until late 1990s that specific laws such as the US Anticybersquatting Consumer Protection Act were passed.[45] In other countries, the authorities could only apply protections to

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[43] Note that I am using cyberspace here in the context of online social interaction and communication which are enabled through the de-centred structure of the Internet, which are often referred to merely as "content".

[44] For a piece regarding "how established principles of trademark law may be applied to resolve" domain name controversies see D. L. Burk, "Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks." *Richmond Journal of Law and Technology* 1, no. 1 (1995).

[45] Anticybersquatting Consumer Protection Act (ACPA) [1999]

trademark holders regarding cybersquatting of ccTLDs.[46] A similar move to regulation was made with regards to the protection of copyrighted materials, made available through the increased availability of software and technology. In 1995, this concern was dealt with first by the US DoC's "Working Group on Intellectual Property Rights". The proposed solution was legislation to reinforce the traditional copyright laws. The No Electronic Theft Act (1997) and the Digital Millennium Copyright Act (1998) were US examples.[47] However the main issues were just in the making towards the end of the decade with the increase in file sharing technologies known as "peer-to-peer" which to date pose serious challenges to governments and copyright holders across the globe.

But more important than domestic regulatory developments is the role of international law (albeit in a limited fashion) in the nascent stages of this technological, social and legal field. Bodies such as the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO) were most important in the regulation of copyright and intellectual property. Although the two WIPO Copyright Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) are not directly aimed at the Internet, they require signatories to "provide adequate and effective legal remedies against the circumvention of effective techonological measures that are used by authors in connection with the exercise of their rights."[48] These treaties are believed to be "indisputable example[s] of international treaty based, *top down*, development of

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[46] The authorities who regulate the country code TLDs are generally not-for-profit organizations. In some cases (e.g. Australia) these organisations grew out of the sheer expansion of the number of domain names by the end of the 1990s and the beginning of 2000s and the failure of one person to process and manage them. Other examples of Trademark restriction on domain names (for preventing cybersquatting) include the Canadian Internet Registration Authority (CIRA). It should be noted here that this was before TLDs such as .com and .org became available worldwide to anyone at a set price.

[47] No Electronic Theft (NET) Act [1997]; Digital Millennium Copyright Act [1998]

[48] WIPO Copyright Treaty [1996] T.Doc. 105-17, 36 ILM 65: Art. 11; WIPO Performances and Phonograms Treaty [1996], T.Doc. 105-17, 36 ILM 76: Art. 18.

legal norms regarding the Internet."[49] Other international arrangements affecting the IP and copyright issues of the Internet include the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which not only sets out minimum rules and standards of protection, but also seeks to extend the dispute settlement regimes of WTO to the Internet.[50] Similarly, whilst this agreement is not directed at the Internet, it importantly "extends the dispute settlement mechanism of the WTO" to the field of the Internet.[51]

Second, by 1996 the filtering of indecent material, especially child pornography, became a concern that was to be tackled both by constitutional law and innovative technology. The US Congress passed the Communications Decency Act (CDA) as the Title V of the Telecommunications Act. CDA was meant to criminalise sending or making available of "comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[52] Other countries followed suit and adopted similar legislation. The same kind of concern regarding availability of (mainly) sexually explicit material to children, led to moves within the EU to deal with the issue. These efforts led to the adoption of the European Commission Communication on Illegal and Harmful Content on the Internet,[53]and the European Commission Green Paper on the Protection of Minors and Human Dignity in

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[49] A. Segura-Serrano, "Internet Regulation and the Role of International Law [hereinafter "Internet and Internetional Law"]." *Max Planck Yearbook of United Nations Law* 10 (2006): 210. See also J. Hughes, "The Internet and the Persistence of Law." *Boston College Law Review* 44, no. 2 (2003): 373-376.

[50] WTO Agreement on Trade-Related Aspects of Intellectual Property Rights [1994], 33 ILM 1197.

[51] TRIPPS entered into force in 1995, and extended "the dispute settlement mechanism of the WTO" to the IP field. This extension is argued to also apply to Internet related issues. See Segura-Serrano, "Internet and International Law." *Supra* note 49, at 211.

[52] Communication Decency Act [1996].

[53] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions [1996] (EC) COM (96) 487 final.

Audiovisual and Information Services (also1996).[54] Following the lead of the EU and the US, other countries around the globe took steps towards bringing explicit/indecent material under some form of regulation.[55]

Despite these initiatives, the cross border and open access availability of data and information online inevitably caused international disputes fraught with jurisdictional complexities at their heart.[56] The first and often cited case of cross jurisdictional regulatory conflict culminated in the *CompuServe* case of 1998.[57] This case was a clear example of a clash between protections of data in the state where the website is "located" (the US) and the legislation of the receiving state (Germany) where such data

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54 Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services [1996] EU Com (96) 483 final.

55 The most dramatic move in 1996 was by China which adopted a law regarding Internet regulation, and required "all existing computer networks to liquidate and re-register all Internet providers, and to route these through the Ministry of Posts and Telecommunications." Another interesting take on this is the French example where the State preferred the Internet to be regulated as a broadcasting medium. Until the year 2005, the only example of a regulation for access providers in France was their "obligation [...] to offer technology to their customers to filter content." For an overview on the early attempts (or lack thereof in the case of India) at regulating "obscene publications" see A. Kamal, *The Law of Cyberspace: An Invitation to the Table of Negotiations.* Geneva: United Nations Institute for Training and Research, 2005: 121-127.

56 Debates surrounding jurisdiction were central to the early (and continuing) debates between exceptionalists and non-exceptionalists. See notes 2-5 of this chapter and the accompanying text. More generally on jurisdiction and the "global era", see P.S. Berman, "Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era." *University of Pennsylvania Law Review* 153 (2005): 1819-1882.

57 The first case filed in Munich by the public prosecutor at the end of 1995, was regarding "provision by CompuServe Deutschland (a 100 per cent subsidiary of CompuServe U.S.) of access to publicly available violence, child pornography and bestiality" accessible via the "newsgroups" in Germany. See G. Grainger, "Freedom of Expression and Regulation of Information in Cyberspace: Issues Concerning Potential International Cooperation Principles for Cyberspace." *INFOEthics '98: Ethical, Legal and Societal Challenges of Cyberspace.* Monte Carlo: Australian Broadcasting Authority, 1998: 21. CompuServe initially blocked access to the newsgroups globally, and faced criticism from within the US of "having infringed the freedom of speech and the freedom of the press." Access was restored after parental control software was provided to subscribers. However given that the access of such content by adults was also unlawful, Felix Somm, the managing director of CompuServe Germany at the time, was convicted and a two year suspended sentence was imposed. However this sentence was later appealed and overturned as the judge was understood to have misapplied the appropriate German Internet legislation which frees service providers from criminal liability from content stored on their servers. See LG München (Munich Court of Appeals) [2000] 1051 NJW 53. On the challenges of this case for law see U. Sieber, "Criminal Liability for the Transfer of Data in International Networks - New Challenges for the Internet - Part 1." *Computer Law and Security Report* 13, no. 3 (1997): 151-157.

might be deemed illegal, indecent and prohibited. Even though conflict of laws are inevitable in some situations of cross border information access, regulation of (harmful) content was not unique to cross border jurisdictional issues and considerable uncertainty existed even on a national scale. This became most visible in the US Supreme Court's first Internet related case, *Reno v American Civil Liberties Union (ACLU) 1997*, in which the anti-indecency provisions of the CDA were dismissed and were deemed unconstitutional due to the protection bestowed on free speech by the First Amendment.[58] The consequences of this decision had international importance. Since the Internet's main infrastructure and data originated in the US, domestic legislation regarding "harmful content" had implications for users beyond the territorial jurisdiction of US. Indeed, it made international regulation of Internet content (especially aspects related to freedom of speech) extremely difficult, since data stored on a server within the US enjoys First Amendment protection.[59]

Third, a final area of regulatory concern in the period discussed here is the issue of privacy. Although the challenges of technologies and computers have for a long while been a subject of widespread interest, the Internet posed novel challenges for privacy.[60] The widespread availability of personal computers by the mid1990s meant that issues such as profiling and data mining, using personal data stored online for commercial or personal purposes, became massively important as a public policy concern. Each country (or region in case of EU) had (and still has) a different approach towards protection/regulation of privacy, and this was no different when dealing with the

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[58] *Reno v. American Civil Liberties Union* [1997] 521 US 844.

[59] A. Murray, "Uses and Abuses of Cyberspace: Coming to Grips with the Present Dangers [hereinafter "Uses and Abuses"]." In *Realizing Utopia: The Future of International Law*, edited by Antonio Cassese, 496-507. Oxford: Oxford University Press, 2012.

[60] For early accounts of privacy concern, see for example H. Jr. Kalven, "The Problems of Privacy in the Year 2000." *Daedalus* 96, no. 3 (1967): 876-882. (Predicting normative changes as a result of technological expansion). See also A. Miller, "Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society." *Michigan Law Review* 67, no. 6 (1969): 1089-1246.

Internet. In the US the vision was formed by the combination of First Amendment principles,[61] and a market based approach promoting sector specific self-regulation,[62] whereas the EU treated privacy largely as a civil rights issue requiring protection and empowerment through the State, hence a whole array of data protection laws.[63] Even though such long lasting approaches to privacy existed, there were a number of important developments in this period as a result of the expansion of the Internet.

Even though most of the regulation of privacy occurred on a domestic level, this period also saw the development of some legal arrangements with an international/extraterritorial scope. Most important was the move by the European Community's Data Protection Directive prohibiting data transfer from EU to "third countries" unless "an adequate level of protection" of personal data is provided.[64] This was significant since whilst addressed to European states, its effects went beyond European boundaries and included, most importantly, the flow of data to the US. Strictly speaking this is not a development in international law per se, but, as shall be explained, was an initiative important for further developments of the international legal framework concerned with the Internet. To sum up this section, the initial engagements of law with the Internet and cyberspace were of a largely regulatory nature.[65] On the

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[61] According to the First Amendment of the US Constitution "Congress shall make no law [...] abridging the freedom of speech, or of the press [...]" The US Constitution can be accessed on www.constitutionus.com (accessed June 6, 2014)

[62] On the early articulations of the US approach see generally J. R. Reidenberg, "Resolving Conflicting International Data Privacy Rules in Cyberspace." *Stanford Law Review* 52 (1999): 1315-1371.

[63] For example one can point to the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data [1981] ETS 108 (US not a signatory). For an early analysis and overview of the European (both country specific and regional) data protection regulations see P.M. Schwartz, "European Data Protection Law and Restrictions on International Data Flows." *Iowa Law Review* 80 (1995): 471-496.

[64] Council of Europe and the European Parliament Directive (EC) 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data [1995] OJ L.281.

[65] The regulation of the Internet from the states or institutions are in addition to industry specific standards and community self governance. See generally D. Tambini, *et al., Codifying*

side of Code and infrastructure, the period from 1985-1998 was characterised by a need for further infrastructural, technological and institutional expansion framed by efforts within the US (government and business sector) to keep standard setting and backbone management an American affair. This was done through mostly private entities, purpose built institutions and the research community. In other words Code became more and more institutionalised, standardised and regulated; a considerable change given the previously ad-hoc management of the Internet. Even more important for my analysis is the relationship between law and Internet content and the logic of the legal engagement behind it. In situations where conflict of laws does not apply as a method of application of national laws, states tend to target certain forms of content through direct and indirect regulation. The period under analysis in this section is one where censorship (or filtering) of content is largely absent from states' agendas.

During the period discussed in this section (1985-1998), initially in domestic law and consequently international law, content was treated as a *problem* requiring a regulatory response. This was *dealt with* through a combination of court cases (nationally), dispute settlement mechanisms (internationally), and national and inter-governmental regulation. In the following decade or so, the initial trends of legal engagement with the Internet largely continued. Institutional expansion persisted and took a "multistakeholder" and global tone to it, while a dramatic expansion in the scope and scale of global Internet, also meant more *issues* to *deal with* and *manage* legally in terms of content on the national and inter-state levels. In other words efforts at offering a better regulatory framework continued to inform most legal engagement with the Internet and international law only appeared rarely and around areas where shortcomings of national regulation were felt.

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*Cyberspace: Communications Self-regulation in the Age of Internet Convergence*. New York: Routledge, 2008.

## 2.3. "New" Understandings of "Internet Governance": 1998 to 2012

### *2.3.1. Consolidation of Multistakeholderism*

By 1998, a transnational yet disjointed Internet governance mechanism (institutional, national and at times international) was in place. But given the increased number of institutions in charge, the unprecedented expansion of governmental, commercial and personal use around the globe,[66] and the growing concerns over its management, an inclusive form of cooperative governance was needed.[67] With the growing speed of expansion (especially in the developing states) and a "bottom-up" ethos present in the regulation and standardisation of Code since very early days, centralisation of governance was neither a viable nor a desirable option. In other words as a result of seeing the Internet as a technology that can bring both cross-border harm (cybersecurity concerns) and benefits (development), and cyberspace as a space where governments and/or the private sector are clearly not the only stakeholders/participants/users, a multistakeholder approach to Internet governance emerged. Marzouki argues that the multistakeholder approach "acknowledge[s] that [production and application of Internet norms] are both parts of a continuous and dialectic, mutually transforming process."[68] Multistakeholderism as a governance model culminated in the establishment of the Internet Governance Forum in 2005 and continues to play an important (and disputed) role to date.

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[66] See *supra* note 29.

[67] Jeremy Malcolm calls the governance system before multistakeholderism "an odd patchwork of United States government fiat, decentralised private action and *ad hoc* national and international regulation." For an in depth analysis of the reasons behind the multistakeholder approach and its development see generally J. Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum* [hereinafter *"Multistakeholder Governance"*]. Perth: Terminus Press, 2008.

[68] M. Marzouki, "European Internet Policies Between Regulation and Governance: Issues with Content Regulation." In *Internet Governance and the Information Society: Global Perspectives and European Dimensions*, by Wolfgang Benedek, Veronika Bauer and Matthias C. Kettemann (eds.). Utrecht: Eleven International Publishing, 2008: 134.

After the burst of the dot-com bubble in the year 2000,[69] the coming to power of the Bush Administration and the September 11 attacks, the face of Internet governance changed in the US and so did the relationship between the GAC and ICANN. This change was towards more national concerns about cybersecurity (a legacy which still haunts many governments' relationship with cyberspace and the Internet to the day). The result was a rebalancing of power from the private sector, towards governments in GAC. Even though governments in general were given some more de facto rights with respect to ICANN decisions, the US still kept renewing the MoU with ICANN, and effectively kept an oversight over its actions and decision. This renewed US dominance, in addition to the growing concerns over the economic, security and content related aspects of the Internet, resulted in reactions mainly from developing countries, initiated by China.[70] Reactions from the EU regarding increasing American control were also present.[71] These controversial debates became explicit in the running up to the UN sponsored World Summit on Information Society in 2003, which marked a significant moment in the history of global Internet governance.

In the run up to the First WSIS Conference in Geneva,[72] and in reaction to the increased powers of ICANN under the new by-laws, China and the majority of developing countries called for an International Treaty Body and the formation of an International Internet Organisation.[73] At this stage there was no unified definition of

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[69] The dot-com bubble refers to a speculative bubble that was based on the expansion of new Internet based companies 1997-2000. This rapid expansion was partly because of the invention of the WWW. Between late 1999 and 2001, a significant number of these companies ceased to be traded on the stock exchange simply due to running out of capital. For an analysis of the events and aftermath see C. Alden, "Looking Back on the Crash." *The Guardian.* 10 March 2005. www.theguardian.com/technology/2005/mar/10/newmedia.media (accessed August 10, 2014).
[70] D.P. Fidler, "Internet Governance and International Law: The Controversy Concerning Revision of the International Telecommunication Regulations [hereinafter "The Controversy"]." *ASIL Insights* 17, no. 6 (February 2013).
[71] *Ibid.*
[72] The first World Summit on Information Society was organised by the International Telecommunications Union.
[73] D.P. Fidler, "The Controversy." *Supra* note 70

Internet governance, and it was then that the narrow/broad methods of regulation were branded.[74] In the Geneva process US and EU supported a narrow, Code/infrastructure focused approach, whereas China and the Group of 77 wanted Government leadership in a broad sense,[75] i.e. making Internet content and use a matter of governmental and inter-governmental public policy. In the end both sides compromised on the establishment of the "Working Group on Internet Governance" (WGIG) to provide a definition of IG and identify roles and responsibilities of the main stakeholder groups. The majority of members were non-governmental. WGIG proposed that the Internet should not be governed by a single entity and promoted a multistakeholder approach that has been hailed as "setting a new norm of customary international law."[76] It further proposed the formation of the "Internet Governance Forum" (IGF) as a *discussion space* for Internet governance.[77] However, WGIG did not agree on the role of US government and its oversight over ICANN and TLDs.

Eventually the WGIG proposals became the basis for the Preparatory Committee (PrepCom3) for the Tunis Conference in 2005. Before the new negotiations however, the US used the rhetoric of "security and stability" to justify and maintain its control over the core Internet resources. So far the only aspect of Internet governance which has been relinquished to the sovereign state is the management of the ccTLDs, which

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[74] Narrow regulation refers to the regulation of infrastructure and Code, whereas broad regulation/governance includes both infrastructure and content. On different models of regulation, see L.B. Solum, "Models of Internet Governance." In *Internet Governance: Infrastructure and Institutions*, edited by L. A. Bygrave and John Bing, 48-91. New York: Oxford University Press, 2009.

[75] Group of 77 is an intergovernmental organisation established in 1964 at UN, by seventy seven developing members of the UN. For a full description see The Group of 77. *About the Group of 77*. www.g77.org/doc (accessed August 11, 2014).

[76] J. Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum*. Perth: Terminus Press, 2008: 322.

[77] WGIG. "Report of the Working Group on Internet Governance." Château de Bossey, 2005. http://www.wgig.org/docs/WGIGREPORT.pdf (accessed August 20, 2014).

the US recognised before the negotiations.[78] This recognition played a vital role in easing the developing countries' worries regarding the US's control over the national Internet policies. As a result, China, Brazil and India (three of the main players of the developing world) stopped insisting on an international Internet treaty/organisation.

During all these negotiations, the US voiced a fear of a UN "take over of the Internet" (a "fear" which is alive to date).[79] This was not just in reaction to proposals by the developing countries. This reaction was also visible in relation to the EU's proposals for an increased role for governments at the "level of principle".[80] As a result, heated debates occurred at the highest political and diplomatic levels, and it took many meetings, letters and declarations against the idea of a "UN takeover" (inter-governmentalisation of Internet governance) to ease the tension and make way for the final negotiations in Tunis. The emergence of the Tunis Agenda, through the second phase of the WSIS, was a clear consolidation of multistakeholder approaches to Internet governance, with two important achievements, the establishment of the IGF, and agreeing on a definition of Internet governance.[81]

The request by the Summit to the UN Secretary-General to convene the Internet Governance Forum in an open and inclusive process was the most important outcome of the WSIS process. It was significant for two main reasons. First, IGF was meant as a

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[78] Country-code Top Level Domains are TLDs which specific to each country and their administration is given to "a manager that supervises the domain names and operates the domain name system in that country." See J. Postel, "Domain Name System Structure and Delegation [RFC1591]." *IETF*. March 1994. https://www.ietf.org/rfc/rfc1591.txt (accessed August 11, 2014).

[79] Given the bottom up sensibility behind the governance of the Internet, especially in the last two decades of the twentieth century, the persistent calls for the UN/governmental oversight of the Internet have raised alarms amongst many, especially in the Western/developed world. These fears have certainly been exacerbated by the recent grown role of the ITU in the Internet governance process. See D.P. Fidler, "The Controversy." *Supra* note 70.

[80] See W. Kleinwachter, "The History of Internet Governance." *Supra* note 10, at 59. See also Appendix 1.

[81] The process of coming up with such a definition dated back to before the WSIS 2003, and especially the WGIG report.

substitute for the proposed (and failed) intergovernmental body demanded in the negotiation process, which recognised the role of governments in Internet governance. Secondly, it became a multistakeholder (high level) platform, with no decision making capacity, the messages of which could be used by different organisations (private and public) in charge of decision making.[82] Instead of a mandate for decision making and direct regulation, the role of the IGF was to be facilitative, advisory and promoting regarding a wide range of issues, ranging from security and robustness of the Internet, to public policy regarding everyday use and misuse of the Internet. Even though IGF did not have any direct law making capacity, it was embedded in the larger "regulation obsessed" sensibility behind multistakeholder governance, as a mechanism through which the regulators and standard setters meet and make their regulation better suited to the global character of the Internet as a technological challenge.

The sensibility behind the establishment of the IGF was also visible in the second most important achievement of the Tunis Conference, i.e. agreement over a definition of Internet governance. According to the 2005 Tunis Agenda, "a working definition of Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet."[83] In this mechanism, the responsibilities of the bodies and institutions mentioned in the previous section to regulate and make policies were reaffirmed with the IGF as a forum where all stakeholders make contributions to the wider decision making processes. In addition, governments were given a somewhat conditional responsibility for Internet governance in times when "ensuring the stability, security and continuity of the Internet" is at issue. This was in addition to the explicit recognition of

[82] ICANN, IETF (standards and Code), ITU (infrastructure), UNESCO (multilingualism).
[83] WSIS. *Tunis Agenda for the Information Society*. WSIS-05/TUNIS/DOC/6(Rev.1)-E, Tunis: ITU, 2005. http://www.itu.int/wsis/docs2/tunis/off/6rev1.html (accessed August 20, 2014)

their "rights and responsibilities for international Internet-related public policy issues,"[84] which in effect delegated content regulation to national (and at times international) authorities.[85]

In WSIS, actors showed that they were open to compromise to some extent and this made the future of global Internet governance look promising, in terms of possible "enhanced cooperation" within the multistakeholder framework. Moreover in the years following the Tunis meeting, ICANN's relationship started a process of transformation which eventually came to an end in 2009 with ICANN becoming fully independent.[86] In other words government control was removed from the core resources of the Internet, including the root servers and DNS management. ICANN also began creating regional offices/liaisons, entering into relations with the ccTLD managers and regional organisations. This was with the intention of improving its relation with the GAC (UN member states advising ICANN; non-binding). Even now that the direct influence of the DoC has been removed, the continued registration and existence of the institution in California might put a shadow of doubt over the political and cultural independence of its technical duties. However, ICANN's role in Internet governance is best understood as an example of hybrid governance.[87]

It is noteworthy that in the process of development of Internet governance and the multi-stakeholder approaches, certain discourses were more prominent. On the one

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[84] *Ibid.*, at par 35(a).

[85] See next section.

[86] ICANN finally achieved "full independence" in October 2009 by signing the *Affirmations of Commitments*. See ICANN "Affirmation of Commitments." *ICANN*. 30 September 2009. https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en (accessed August 11, 2014).

[87] Currently this hybrid is mainly seen as one between self governance and international/transnational regulation. However before AoC was signed in September 2009, many scholars counted ICANN as a three way hybrid which included national (US) control and influence as well. See for instance A. Segura-Serrano, "Internet and International Law." *Supra note 49*, at 200. See also H.H. Jr. Perritt,. "The Internet is Changing the Public International Legal System." *Kentucky Law Journal* 88 (2000): 954.

hand, international Internet governance took a clear developmental tone to itself in both Geneva and Tunis Agendas, which put it in line with similar trends within international law regarding global development (economic, environmental, etc.).[88] Focus on issues such as equal access, "digital divide" and telecommunications infrastructure in developing countries are indicative of this turn.[89] On the other hand, Internet security and cyber warfare became a central concern for governments worldwide. However regardless of how many "categories" of actors were included and how many areas were addressed, multistakeholder approaches to governance only reinforced the regulation oriented approach of law towards the Internet and cyberspace. Clearly one area in which multistakeholderism has not yet made its presence solidly felt is in dealing with content, which is still largely seen as desirably and feasibly within the reach of national government regulation and enforcement. What this section demonstrates is that regardless of whether we see it as purely "inter-governmental" and rules based, or more inclusive and diversified, international law is sought as a solution to the expansion of technological innovations as objects of regulation.

### *2.3.2. Content Regulation*

Even though issues regarding content appear here and there in the IGF process as matters of public policy, most content regulation, as with the previous period analysed, remain within the framework of domestic law, and jurisdictional disputes are resolved through conflict of laws. However since my focus is mainly on issues of transnational and international governance, apart from the continuities and the emergence of important court cases, one should also point to the developments (albeit limited) in the role of international law (specifically intergovernmental) in the regulation of online

[88] This was parallel to the development and unfolding of the Millennium Development Goals in the early 2000s.

[89] A glance at the agendas of each IGF meeting and the topics of their working groups will demonstrate this nicely. For example see IGF. *IGF 2012 - 'Internet Governance for Sustainable Human, Economic and Social Development'*. Baku: United Nations, 2012.

content. Although this period saw an expansion of regulation into new areas (e.g. e-commerce),[90] I will focus again on developments regarding the three areas of content discussed in the previous section. Developments in these areas are indicative of changing approaches regarding data and content regulation.

Copyright and intellectual property continued being major issues for regulation. The expansion of file sharing and widespread availability of copyrighted material on different websites available to all added to the complications. The only implementable solution for governments continued to be either blocking and filtering websites and softwares that make illegal access to copyrighted material possible, or to leave the copyright disputes to the courts.[91] Even though there is a modicum of international consensus over the importance of protecting intellectual property, to date regulation and legal approaches have proved very ineffective in preventing large scale access to copyrighted materials on the Internet. Despite all the difficulties however, copyright remains an area where scholars seem optimistic about a possible role of some sort of international legal harmonization.[92]

The continuing (and growing) significance of American stakeholders in the Internet, gives court cases involving American actors a global significance. Probably the most significant series of cases occurred in early 2000s and they are often referred to as the *Yahoo!* case(s).[93] These cases concerned a dispute between a French anti-racism campaign group (LIRCA) and Yahoo! Inc. regarding the availability of Nazi memorabilia on the latter's auction website. Sale of memorabilia from the Nazi period is

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[90] See for instance Council of Europe and the European Parliament Directive (EC) 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [2000] OJ L178. [Hereinafter "the E-Commerce Directive"]

[91] *A&M Records, Inc. v. Napster, Inc.* [2001] 239 F.3d 1004 (9th Cir)

[92] A. Murray, "Uses and Abuses." *Supra* note 59, at 507. See also A. Segura-Serrano, "Internet and International Law." *Supra* note 49.

[93] For an insightful set of reflections on the Yahoo! Case with respect to different conflict of laws issues see the collection of papers in Special Feature on Cyberage Conflicts Law in *Michigan Journal of International Law* 24, no. 3 (2003): 663-766.

illegal in France. Therefore, the LICRA sued *Yahoo!* and following expert advice the court ordered *Yahoo!* to block access to the web pages displaying the banned goods for French users.[94] This decision was challenged by *Yahoo!* in the US and the District Court found that the French court had no jurisdiction over *Yahoo!*.[95] The decision was reversed in 2004 by the Court of Appeals,[96] which argued that "the California Court had no personal jurisdiction over French parties and the France had every right to hold *Yahoo!* accountable in France."[97] In this process, important principles regarding the applicability of domestic laws to online action and content developed. In this case France's right to apply its national laws to the occurrence of the harmful events inside France was recognised. In other words the application of the laws of the "receiver country" was recognised. This is also of international significance since a similar approach has been taken by other countries.[98]

In the same period (the early 2000s), probably one of the most significant developments in the role of international (intergovernmental) law in Internet (content) regulation occurred. The 2001 Council of Europe Convention on Cybercrime (the Budapest Convention) was the first content related intergovernmental treaty attempting to harmonise national law regarding cybercrimes. To date, this is the only treaty directly dealing with Internet content, even though its effective scope is limited to the production and distribution of child pornography.[99] In addition to the Budapest Convention, and in the early years of the decade, the EU passed a number of other

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[94] LICRA & UEJF v. Yahoo! Inc. [2000] T.G.I. Paris (*Dalloz)*
[95] Yahoo! Inc. v. LICRA [2001] 145 F. Supp. 2d 1168 (N.D. Cal.)
[96] Yahoo! Inc. v. LICRA [2004] 379 F. 3d 1120 (9th Cir.)
[97] A. Segura-Serrano, "Internet and International law." *Supra* note 49, at 203.
[98] An example of this would be the 2002 *Gutnick* case, where the Australian Supreme Court found jurisdiction over a defamation claim by an applicant in Australia, regarding content sourced from New Jersey. See Dow Jones & Company Inc. v. Gutnick [2002] 210 *CLR* 575.
[99] Convention on Cybercrime [2001] ETS 185.

content related directives regarding copyright (2001),[100] privacy (2002)[101] and e-commerce (2000).[102] These regionally binding instruments are examples of the increased legal effort of bringing content and public use under some sort of governmental regulatory oversight.

International developments regarding privacy are noteworthy in this period and are of significance. Following the EU's 1995 Data Protection Directive, imposing restrictions on data transfer to "third countries", and given the large amount of data exchanged between the US and the EU, they reached a compromise through a "Safe Harbour" agreement (SHA) in 2000, through which certain certified US companies would not be subject to EU limitations anymore.[103] Although it is a soft law instrument, enshrining an important and rare compromise, SHA is widely questioned for its value in privacy protection.[104] Concerns regarding personal information and data are even more widespread today, especially since the recent revelations of governmental (mainly the US) surveillance and encroachments of privacy of not only citizens, but also high ranking officials.[105]

Censorship is perhaps the most widespread form of content regulation/control on the national level and this practice became increasingly widespread in the twenty first

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[100] Council of Europe and the European Parliament Directive (EC) 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L167, implemented the 1996 WIPO Copyright Treaty in the EU, which in effect also adds to the influence of international law on the conduct of content regulation by the states in question.

[101] Council of Europe and the European Parliament Directive (EC) 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector [2002] OJ L201.

[102] EU E-Commerce Directive, *Supra* note 90.

[103] This agreement allows US companies who want to do data exchange with EU to sign up (purely voluntarily) to the rules set by EU protecting their customers.

[104] For an argument questioning the value of the compromise (especially in defence of the European privacy values), see J. R. Reidenberg, "E-Commerce and Trans-Atlantic Privacy." *Houston Law Review* 38 (2001): 717-749.

[105] Here I am referring to the recent developments surrounding the NSA's surveillance schemes, revealed by Edward Snowden.

century, a time where availability of content deemed harmful became a concern of governments around the world. Governments are facing an unprecedented expansion of global social networking and increasing cultural and political exposure of citizens to a vast array of information and communication media.[106] Therefore, in addition to directly legislating on "harmful content" hosted within their borders, they also limit the availability of certain websites and services within their borders through imposing laws on the national Internet infrastructure, mainly the ISPs.[107] This was important for two main reasons. First, this was the first time in the history of the Internet that governments brought parts of the Internet infrastructure such as ISPs under their regulatory framework and imposed obligations on them for the purposes of content regulation. Second, on a transnational and institutional level, the regulation and standardization of Internet infrastructure so far pointed to maintaining the de-centralised network. Even though most telecommunications industries were privatised worldwide,[108] and transnational and international institutions (e.g. ITU) played a vital role in their standardisation, almost all countries took regulatory measure to manage

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[106] It is important to note that it was during this period (since 2006) that Wikileaks also changed the face of the hierarchy of information available to everyone online, and in turn this arguably changed the Internet for some time to come. See M. L. Sifry, *Wikileaks and the Age of Transparency*. New York: Or Books, 2011.

[107] Internet filtering happens in most countries globally. There are endless examples a few of which would suffice for the purposes of this chapter. For in the UK for example, certain websites are inaccessible because Internet providers, servers, or are "requested" to block websites (or web pages) for infringement of copyright, promoting terrorism or child pornography. In the case of terrorism see for instance BBC. "Google Reveals 'Terrorism Video' Removals." *BBC*. 18 June 2012. http://www.bbc.co.uk/news/technology-18479137 (accessed August 11, 2014). A similar case-specific approach exists in many other countries. However in some Asian countries such as Singapore, media (including Internet) are under the control of government bodies (in the case of Singapore the Media Development Authority) who create media specific Codes of Practice, binding on service providers. Such codes of practice also do exist in other countries (e.g. UK and New Zealand) but are not always binding. See generally J. Kulesza, *International Internet Law*. *Supra* note 8, at 109-124.

[108] The move towards the liberalisation of the telecommunications, started in the United States in 1960s, and was more or less followed by the majority of the developed world around two decades afterwards.

infrastructure and content centrally.[109] However even in the strictest regulatory frameworks, (e.g. China or Iran) control is far from absolute.[110]

Andrew Murray's observations in 2007 regarding Internet content regulation and the ultimate failure of achieving a real settlement from (international) legal instruments for issues at hand are important.[111] Murray suggests that national, international, or court law only make up one node in a wide "web of regulations" which forms what is generally referred to as Internet governance.[112] Building on these observations in a more recent reflection on content regulation, he emphasises the role of free expression guarantees applied in the Reno v ACLU case, and argues that "content may just be beyond the direct control of the international legal community," which in his analysis includes institutions, organisations and states.[113] However the reason for this failure seems to be understood by many countries to be the de-centralised nature of the governance methods, including the multistakeholder approach. As a result, in recent years, we have seen increasing calls in the international community for the centralisation of Internet governance under the all too familiar ambit of inter-state law making, giving governments the final say in the governance of this seemingly intrusive space. Such calls were most explicit in the recent WCIT talks organised by the ITU in 2012, which shall be the starting point of the next section of my historical analysis.

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[109] The most famous examples of this kind of activity are China and Iran which, through maintaining a monopoly over Internet backbones, and imposing restrictions on ISPs, have managed to impose a great deal of national control over both Code, and as a result over access to content. Countries such as Iran and North Korea have gone so far as to envision and design national computer networks ("national Internet"), which act separately from (and parallel to) the global Internet. See for example J. Ball and B. Gottlieb. "Iran Tightens Online Control by Creating Own Network." *The Guardian.* 25 September 2012. http://www.guardian.co.uk/world/2012/sep/25/iran-state-run-internet (accessed April 23, 2013).

[110] With regards to content regulation in China see M.B. Land, "Google, China, Search." *ASIL Insights* 14, no. 25 (2010). ("Although the government's control of the Internet is effective, it is not absolute").

[111] A. Murray, *Regulation of Cyberspace*. *Supra* note 30, at 227-229

[112] *Ibid,* at 22-54

[113] A. Murray, "Uses and Abuses." *supra* note 59, at 507.

Despite the many developments and innovations in governance (multistakeholder representation and inclusiveness) in the period between the establishment of ICANN and 2012, legal engagement, as in the previous period was solely aimed at regulation. This also applies to the concept of "multistakeholderism" which is ultimately a collection of stakeholders and their views in order to have better *regulation* by the different states, organisations and institutions in charge. In other words, the different aspects of the Internet under governance, especially content, continued to be issues to be *dealt with* through mechanisms of social control, including authoritative rules, monitoring and administrative (standard setting) organisations. Moreover, and importantly for this thesis, the very limited instances where international law (understood here simply as law making based on the consent of the subjects of international law, predominantly states but also institutions) has been used or proposed, it has been to cover the *regulatory* shortcomings of national, institutional and multistakeholder policy making. As I will explain in the next section this obsession with regulation seems to be intensifying at present.

## 2.4 The International Regulation of the Internet

Despite the continuing role of international multi-stakeholder approaches such as IGF (the initial 5 year mandate renewed in UNGA for another 5 years), there are very mixed feelings regarding its success.[114] As a result of the perceived weaknesses in multistakeholderism and the privileged position of the West (especially US) through the dominance of their private sector, in recent years, there has been a return of calls for

[114] For an argument in favour of multistakeholderism's success, see J. Waz, and P. Weiser. "Internet Governance: The Role of Multistakeholder Organisation." *Journal of Telecommunications and High Technology Law* 10, no. 2 (2013): 331-350.Viewpoints against the multistakeholder vision are often expressed in calls for more government control over the Internet Core resources and international public policy issues. For a collection of such views, from the run up to the controversial WCIT (ITU) talks of 2012 see http://wcitleaks.org. (last accessed 13/08/2013) See also W. Drake, "Multistakeholderism: Internal Limitations and External Limits." *MIND: Co:llaboratory Discussion Paper Series* , September 2001: 68-73.

international law and interstate governance,[115] even though ICANN, IETF, IAB, ISOC and W3C continue controlling the Code layer of the Internet on an international level. Although most content issues are dealt with through national law (using both Code and law),[116] and jurisdictional issues through conflict of laws approaches, there seems to be a growing belief that (public) international law and intergovernmental cooperation has a vital role to play.[117] Probably the most prominent areas where inter-governmental law is in place and actively enforced are intellectual property (WIPO Treaties) and child pornography (EU convention of Cybercrime). Given the effects of Reno v ACLU in providing First Amendment protection to Internet content stored in the US, national content regulation is bound to have little option but to filter/censor. This difficulty, in addition to the seeming consensus over Lawrence Lessig's "Code as law", calls for increased governmental and intergovernmental control over the Code.

Different authors see a growing potential for international law,[118] especially in the form of treaties and intergovernmental institutions but also using principles and concepts of

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115 See for instance D.P. Fidler, "The Controversy." *Supra* note 70.

116 With global expansion of the Internet, regulatory issues regarding content are bound to increase. This is also not just on an international level, as even within domestic setting, new phenomena such as "Cyberbullying" and electronic harassment are added to the continuing issues such as pornography and indecent material. See for instance Dilley, Sean. "Cyberbullying Laws 'Failing To Keep Up'." *Sky News.* 17 August 2014. http://news.sky.com/story/1319935/cyberbullying-laws-failing-to-keep-up (accessed August 18, 2014).

117 So far cooperation is mainly in areas of cybercrime, intellectual property and privacy. Scholars started promoting international cooperation and international legal remedies to the jurisdictional issues early on in the governance story. For early remarks see McGregor, Heather. "Law on a Boundless Frontier: The Internet and International Law." *Kentucky Law Journal* 88 (2000): 967-986. Another example is Franz C. Mayer's proposal that given the central importance of Code in the governance of the Internet, public international law in the form of multilateral decision making should be used. For Mayer this was the only way 'the international community' could make sure "code is not hijacked by powerful private vested interests or by countries more advanced in computer technology." See Mayer, Franz C. "The Internet and Public International Law - Worlds Apart?" *European Journal of International Law* 12, no. 3 (2001): 617.

118 For early views on the potentials of international law see generally N. Weinstock Netanel, "Cyberspace Self-Governance: A skeptical View from Liberal Democratic Theory." *California Law Review* 88 (2000): 398-498. See also A. Segura-Serrano, "Internet and International law." *Supra* note 49; *and* J. Kulesza, *International Internet Law. Supra* note 8; *and* A. Murray, "Uses and Abuses." *Supra* note 59.

international law such as Common Heritage of Mankind (CHM) and International Spaces, to play a role in governing and regulating the Internet.[119] In addition there is a continuing application of human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, which indirectly impose obligations on states in the way they treat content providers and users. For instance according to Molly Land "although Article 19 (ICCPR) does not guarantee a right to the 'Internet' per se, it explicitly protects the technologies of connection and access to information, and it limits states' ability to burden content originating abroad."[120] Of course not all states read their human rights obligations as Land does and enforcement of human rights is the primary responsibility of states. However, most states that seek increasing control through international law, hope to realise this control not necessarily through increased obligations but through more control over the Internet Code and infrastructure.

Old calls for intergovernmental bodies overseeing different aspects of Internet governance have recently been combined with calls by almost the same group of countries calling for an intergovernmental body in 2012, for more national power over Code and infrastructure. This could partly be that the multistakeholder approaches to governance after around a decade of negotiations and compromises seem to fail in achieving certain solid results for countries with concerns supposedly different from the developed countries. Even though multistakeholderism is seen by many others as

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[119] The principle of Common Heritage of Mankind and the "international space" analogy has been used by many scholars as a possible strategy of dealing with the regulation and management of cyberspace under international law. See for example D. C. Menthe, "Jurisdiction in Cyberspace: A Theory of International Spaces." *Michigan Telecommunication Technology Law Review* 4 (1998): 69-103. In the fifth chapter, I will expand more on international spaces in international law and the way it characterises international law's spatial orientation.

[120] M. Land, "Toward and International Law of the Internet." *Harvard International Law Journal* 54, no. 2 (2013): 393-458.

"largely successful,"[121] one can witness increasing problems arising regarding the output/process, diversity/participation, and clarity of outcome.[122] Ten years after the 2003 WSIS, the first review summit (WSIS+10) was held at the UNESCO (United Nations Educational, Scientific Organization) headquarters in Paris, and according to observers, confirmed a number of the weaknesses of the multistakeholder approach.[123] Multistakeholderism needs to find mechanisms to deal effectively with the wide range of national approaches regarding the regulation of Internet and to answer to the concerns regarding the domination of US actors even in the multistakeholder processes.[124] Even though most national regulatory concern is regarding Internet content and security, following Lessig's influential theory, countries are seeking more control over the infrastructure and backbone of the Internet and international law seems to be the preferred language.

A clear example of the above is the 2012 World Conference on International Telecommunications convened by ITU to amend the 1988 international telecommunications regulations (ITRs) given the new environment, with the Internet spreading with little direction from intergovernmental processes. Even though the Internet was not supposed to be the subject of the conference, it became the centrepiece. The debate was between proponents of the multi-stakeholder and

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121 See for instance J. Waz and P. Weiser, "Internet Governance: The Role of Multistakeholder Organisation." *Journal of Telecommunications and High Technology Law* 10, no. 2 (2013): 331-350.

122 I should note that WSIS is not the only multistakeholder process in Internet Governance, and not all multistakeholder institutions suffer from the lack of clarity on objectives or outcomes. ICANN continues to be important in pursuing a relatively well defined agenda through a multistakeholder approach.

123 It has been suggested by Francesca Musiani that the WSIS/IGF process is (and has been) out of touch with "the 'nitty gritty' details, day-to-day struggles, and material constraints of who participates, when, for what reasons, and how the practical results of this participation can be measured and leveraged for concrete next steps." F. Musiani, "WSIS+10: The Self-Praising Feast of Multi-stakeholderism in Internet Governance." *Internet Policy Review* 2, no. 2 (2013): 5.

124 According to Was and Weiser "many governments in both the developed and developing worlds perceive that the United States—directly or indirectly—'runs the Internet' through the dominant participation of its companies and stakeholders in multistakeholder organizations." J. Waz and P. Weiser, "Internet Governance: The Role of Multistakeholder Organisations." *Supra* note 121, at 3.

decentralised approach (generally Western/developed countries), and countries which wanted to use the UN body to bring Internet governance under states' control.[125] Even though no binding resolution was reached, the conference raised concerns for the US and EU of a growing sensibility (at least amongst a majority of ITU members) regarding a need for an increasing role of governmental and inter-governmental bodies in Internet governance.[126] It unveiled a deeply divided and fragmented regulatory environment around the governance of the Internet which has been referred to as a "digital cold war."[127]

The calls for increased governmental influence over the different Internet layers have only to be intensified given the recent developments regarding global data surveillance; a revelation which according to many highlights and intensifies the differences of approach internationally,[128] and threatens principles of openness and freedom rooted in its design.[129] These revelations even brought the EU-US Safe Harbor Agreement to the

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125 Russia for instance proposed an article on the Internet, giving "equal rights" to all member states in the management of Internet core resources and its infrastructure. There were also other proposals regarding spam, addressing and security. After many negotiations the newly proposed ITRs had provisions on the Internet (especially the non-binding resolution 3 which resembled the Russian proposal in saying that "all governments should have an equal role and responsibility for international Internet governance." See D.P. Fidler, "The Controversy." *Supra* note 70.

126 *Ibid.*

127 The revised ITRs enter into force between members who sign it by January 2015. The countries that do not sign will not be bound by the new regulation but only the old 1988 ones. This is the nature of an emerging fragmentation in this area of law. See Global Partners and Associates. *Internet Governance: Mapping the Battleground.* Global Partners and Associates, 2013.

128 An example of this would be the different approaches towards Internet privacy in the US and the EU. The American companies use "notice-and-consent" as a method of gaining access to data for the purposes of "data processing", whereas this self regulatory method is not favoured in the EU, where scepticism towards "consent" is evident in them requiring formal legal authorisation (whether EU law or other forms of authority) for accessing information normally protected by privacy laws. For an insightful analysis of privacy in the time of cloud computing see P. M. Schwartz, *EU Privacy and the Cloud: Consent and Jurisdiction Under the Proposed Regulation.* Privacy and Security Law Report, The Bureau of National Affairs, Inc., 2013.

129 J. Naughton, "Edward Snowden's Not the Story. The Fate of the Internet Is." *The Guardian.* 28 July 2013. http://www.theguardian.com/technology/2013/jul/28/edward-snowden-death-of-internet (accessed August 18, 2014).

brink of collapse.[130] In a situation where cloud-computing has become more prevalent than ever, and people, governments and institutions have unprecedented information available online, governments are bound to seek more control. As was revealed in the wake of Wikileaks and Snowden's revelations, this control takes on a direct form through surveillance and the blurring of the public/private divide regarding information, a large portion of which is done through governments. However given the largely non-governmental institutionalisation of regulation, and the essentially cross border and de-centralised design of the Internet, international law (understood traditionally) seems to be a fitting solution for some, since it clearly privileges the state as the key legal personality. The recent proliferation of inter-governmental debates and negotiation leaves the actors in global Internet governance with a dilemma. On the one hand, there is multistakeholderism with all its weaknesses (especially lack of decision making and implementation capacities) holding on to the inclusive and decentred structure of the Internet, and on the other, there is international intergovernmental law which also faces clear limitations such as lack of consensus and dominance of standardising institutions with clear Western support. Despite their differences, the debate between these two modes of governance is solely about the best ways to regulate the Internet and the issues arising from content.

ITU's position as a negotiation forum for states and industry representatives has proven crucial lately, as the coordinator for the World Summit on Information Society (Geneva 2003 and Tunisia 2005) and the World Summit on International Telecommunications (Dubai 2012). As noted by Ahmad Kamal, the regulation of telecommunications involves an "interaction of technology, economic forces, institutional settings and

[130] See for instance I. Traynor, "NSA Surveillance: Europe Threatens to Freeze US Data-Sharing Arrangements." *The Guardian.* 26 November 2013. http://www.theguardian.com/world/2013/nov/26/nsa-surveillance-europe-threatens-freeze-us-data-sharing (accessed August 18, 2014).

constraints, and interest groups."[131] ITU's (somewhat indirect) role in Internet governance will undoubtedly continue. However given its intergovernmental design, it has always been an unlikely candidate in taking a leading role in Internet governance given the currently limited role of (and consensus among) governments regarding their respective roles in this process. Whether international law is eventually to become the dominant framework for governing the Internet, it seems clear from the history that its role will be that of governing/regulating it as a technical medium, in which its content is separated from its form.

## 2.5. Conclusion

In this chapter, I described, from a historical perspective, the development of the regulatory framework which animates the relationship between law and the Internet. I have shown that Internet governance is largely a hybrid of institutional (international/transnational) governance of the Code and infrastructure of the Internet on the one hand, and national regulation (courts and state legislation) of content on the other. I paid particularly close attention to the so far limited role of international law in the larger field of Internet governance. With the exception of the Budapest Convention and the EU-US Safe Harbor Agreement, international legal bodies such as the ITU, WIPO, and WTO have a mostly indirect regulatory control over the Internet and content.

As it can be observed in the discussion of this chapter, international legal engagements with the Internet rarely refer to it as "cyberspace" and even if they do, they use it as a term to refer to "Code-plus-content" as a decentred structure acting as a container for data and information, which in turn is accessed by users. What I would like to highlight

[131]A. Kamal, *The Law of Cyberspace: An Invitation to the Table of Negotiations*. Geneva: United Nations Institute for Training and Research, 2005: 223.

is the seeming absence of any engagement with what might be called "the sociality of cyberspace". By this, I mean cyberspace as a socio-spatial phenomenon constructed through users' social experience and interaction rather than just a technological phenomenon (as it is largely analysed as by international law).[132] What this chapter (in parallel to the "regulability debate" pointed to in the introduction of this chapter) shows is an image of this (international) legal engagement with law, imagined and utilised to limit or enable certain forms of online and offline "action" in order to bring control, stability and predictability to the online environment. Even when scholars seek more engagement with the exceptionality of the space, they tend to propose exceptional measures in order to govern and regulate the Internet.

In drawing attention to the limits of the regulatory initiatives, however, I do not want to suggest that there is therefore a need for more or less effective regulation. Rather I want to draw attention to what is absent from such debates and governing methods. Having pointed to these "blind spots" of analysis, in the next chapter of this thesis, I will turn my attention to two different spatio-legal frameworks for thinking about law, space, sociality and the relations between them; namely *logos* and *nomos*. These will then serve as the central conceptual frameworks for my subsequent re-analysis of cyberspace (chapter four), an analysis of the socio-spatiality of the "international" in international law (chapter five) and finally the illustration of my thesis through the discourse of social movements and international law (chapter six).

[132] See chapter 4 for the detailed analysis of my socio-spatial description of cyberspace, as opposed to the Internet.

# Chapter 3 – Logos v Nomos: Two Conceptual frameworks for Law

> *We are in the epoch of simultaneity: we are in the epoch of juxtaposition, the epoch of new and far, of side-by-side, of the dispersed. We are at a moment, I believe, when our experience of the world is less that of a long life developing through time, than that of a network that connects points and intersects with its own skein.*
>
> *M. Foucault*

## 3.1. Introduction

In this chapter and the next, I build on the lack of attention by international law to the non-territorial social relations which characterise a wide range of our experiences in using the Internet. It is important to analyse the relationship between international law and cyberspace in such a fashion so as to broaden it beyond the treatment of the Internet as a mere object of regulation, to thinking about cyberspace not only as a space produced by (international) law but more importantly a space which is socially co-produced, experienced and lived.

What the regulation-centred approach to Internet governance suggests is a preference to see the users as people and persons placed in a specific location (often within the territory of the state) whose actions and words are treated as online content in need of regulation. As discussed, this approach has a blind spot in relation to the *socialities of cyberspace*. Since in this thesis, I am exploring the potentials offered by cyberspace for a re-conceptualisation of international socio-spatiality, it is necessary to discuss the limitations of the (international) legal approach to cyberspace through a fitting

conceptual framework; a framework which problematises law's relationship to (and understandings of) people, persons, societies and spaces. In this chapter, I develop this framework through differentiating between two ways of thinking about law, *logos* and *nomos*. I particularly develop this relationship, using a combination of philosophical, legal and (critical) geographic scholarship, so that the concepts are differentiated on the basis of the relationship between the *legal*, the *spatial* and the *social*.

The theoretical arguments developed in this chapter are central for connecting the wider analysis of this thesis regarding international law, cyberspace and social movements. Given the diversity of the contexts in which the concepts of *logos* and *nomos* are used, it is not possible to identify a single conceptual thread developing through different times. Instead what I wish to do is to develop a form of synthesis from different uses of the two concepts across time. I do this by combining the "original" insights with the observations of critical (legal) geography, in order to construct my own understanding of the concepts.

This chapter has a simple overall structure. I use the first section to elaborate on the concept of *logos,* starting from its use in early Natural Law thinkers to the use of *logos* as Word in Christianity, to modern developments in jurisprudence, especially the development of legal positivism in the nineteenth and twentieth centuries. I will then move to my investigation of *nomos*, initially focusing on Carl Schmitt and Robert Cover. After highlighting the spatial problematic of their theories (using David Delaney), I construct the crux of my understanding of *nomos* through the works of Delaney, Michel Foucault and Doreen Massey. I conclude this chapter by reflecting on the distinctions between the two concepts covered in this chapter, and their implications for the wider thesis.

## 3.2. *Logos:* A Conceptual Synthesis

The association of *logos* with law has a long history which dates back to early Natural Law thinkers such as Cicero. Moreover, equally (if not more) significant associations of *logos* have been with ideas such as speech, Word, reason and argument. Even though the latter are often not directly associated with law, they can be usefully synthesised to construct an image of law, represented by the authority (through reason or rationality) of command (speech). In other words, the concept of *logos,* developed in this section is one which understands law as ensuing from some "external" source, whether natural, divine or sovereign. Here, I will point to the main conceptual frameworks represented by *logos,* and then through conjoining different representations of the concept with observations of legal geography, develop my understanding of *logos*.

The word *logos* is translated from Greek as reason or speech, and it is in ancient Greek philosophers that we can seek the first associations of the concept with law. For Heraclitus, in whose writings *logos* first appeared, *logos* "include[d] or embod[ied] something like a general 'law of nature'[...]".[1] Moreover this "nature" becomes a "critical concept" acting as the "rational foundation of all that exists"; a foundation which "had something 'objective' about it," even though the radical divide between subject and object was yet to be fully developed.[2] Further use of the concept by the Stoics directly associated law with *logos,* through the notion of "right reason", which shares Heraclitus' notion of *logos* as a "rational" account common to everything.[3] In other words, both the pre-Socratic and Stoic understandings of *logos* seek an "eternal" or "universal" law, and

[1] J. Barnes, *The Presocratic Philosophers*. London: Routledge and Kegan Paul Ltd, 1982: 59
[2] C. Douzinas and A. Gearey, *Critical Jurisprudence: The Political Philosophy of Justice.* Oregon: Hart Publishing, 2005: 80, 83.
[3] J. Barnes, *The Presocratic Philosophers. Supra* note 1. For an account of the Stoics' understanding of *logos* as law, see M. A. Jackson-McCabe, *Logos and Law in the Letter of James: The Law of Nature, The law of Moses, and the Law of Freedom.* Boston: Brill, 2000: 29-86

they establish this through the authority of reason and rationality associated with and embedded in "nature".

Another important use of the word/concept in ancient Greece was by Plato who also associated *logos* with reason and/or nature. For him, *logos* is the "reasoned account (argument)" through which one can gain "true knowledge" about a thing. Put in his own words "if one cannot give and receive a logos of anything, one has no knowledge of that *thing*."[4] There is a difference between Plato's use of the concept and that of Heraclitus and the Stoics described above. Unlike the latter two, Plato locates logos as "external" to the thing about which true knowledge is to be gained,[5] thus locating the authority of reason not in its commonality to everything, but rather in its full availability to "a god" who has access to "a definitive account of [...] matters."[6] This "externalisation" points to an essential spatial element of the image of *logos*. The detachment of *logos* from the *thing* signals a detachment of law from materiality both in its physical and discursive forms. In other words, *logos* is separated from the socio-spatial setting about which it is to provide true knowledge, or if seen as law, separated from the space/object to which it is applied.

A representation of *logos* which shares characteristics similar to those of Plato's analysis is in the Judeo-Christian tradition. Bertrand Russell, in his famous *History of Western Philosophy,* makes a connection between Plato's *logos,* as the "intellectual element" in the latter's religion, and the identification of Christ with *logos* by the "author of Saint John's

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[4] Plato cited in R. C. Cross, "Logos and Forms in Plato." *Mind* 63, no. 252 (1954): 433. [Emphasis added]

[5] This detachment is also visible in Plato's general philosophy. The duality between "reality" or "true knowledge" and what we observe and have access to is clear in his famous "Allegory of the Cave" and the Sun metaphor presented in his book Republic (Book VII). See generally Plato. *The Republic.* Translated by Benjamin Jowett. Internet Classics Archive, 360 B.C.E. http://classics.mit.edu/Plato/republic.html (accessed April 11, 2013).

[6] A definitive account of these matters eludes humans (29d1) and is available only to a god (53d4–7). See *ibid.*

Gospel."[7] It was following this latter use of *logos,* and other observations through Platonic philosophy, that St. Augustine famously said that "In the beginning was the Word, and the word was with God, and the word was God [...]."[8] Here *logos* is directly associated with *the* divine source of authority detached from the material and discursive base of everyday life. However, more important is the addition of a conception of *logos* as an "argument" or "rationality", which is fully or in part accessible (and necessary) for any "true knowledge", of a form of *command* ensuing from an external source. As with Plato's "argument", for the Christian tradition, *logos* (Word) also seems to operate on the basis of a binary between a transcendent God (Plato's realm of reason) and everything else (Plato's object of true knowledge).

Perhaps a more recent use of *logos* helps crystallise the nature of the "externalisation" which is at the heart of *logos*, namely, Jacque Derrida's important linguistic critiques of what he calls *logocentrism.*[9] "Logocentric" theories, according to Derrida, operate on three levels. On the first level, a structural distinction is assumed to exist between *signifier* and *signified.*[10] On a second level, *logos* is characterised as signifying a "transcendental signified" (still assumed to be structurally separate) towards which an "irresistible desire" for signification is present.[11] Finally, logocentric theories see *speech* as the primary mode of signification, with the written word only signifying the spoken word (another

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[7] B. Russell, *History of Western Philosophy and its Connection with Political and Social Circumstances from the Earliest Times to the Present Day*. London: George Allen and Unwin Ltd., 1948: 313. Russell speaks of *logos* in the Christian sense to mean "reason", when he says that "*Logos* should be translated "reason" as the translation of *nous."*

[8] St. Augustine, "Book Seven." In *The Confessions of Saint Augustine*, by Saint Augustine, translated by Edward B. Pusey. Rockville: Arc Manor, 2008: 88.

[9] See generally J. Derrida, *Of Grammatology*. Translated by Gayatri C. Spivak. Baltimore: The Johns Hopkins University Press, 1997.

[10] For an original structural analysis of linguistics and the distinction between the signifier and the signified see generally F. De Saussure, "On the nature of Language." In *Structuralism: a Reader*, edited by Micheal Lane, 43-57. London: Jonathan Cape, 1970. According to Derrida's reading, De Saussure argues that "the linguistic object is not defined by the combination of the written word and the spoken word: *the spoken form alone constitutes the object."* J. Derrida, *Of Grammatology*. *Supra* note 9, *at* 3.

[11] J. Derrida, *Of Grammatology*. *Ibid.,* at 49.

signifier).[12] The most important characteristic for my analysis is the separation Derrida alludes to here between the signifier and the signified. The position of the signified in *logocentrism* is similar to Plato's "True Knowledge" and of course Augustine's God. Taking the former theory to law and associating *logos* with the word of law, furthers the image of law as words which signify the will/command of an "external" source (of authority). The image of law developed here also stands for the command of the sovereign, as exemplified in positivist legal thought of the nineteenth and the twentieth centuries.[13]

It is the detached command of the sovereign that acts as the backbone of positive law, a position that was previously filled by God, through an interplay of faith and reason. With the increased power and authority of the sovereign in European societies, the idea of law as 'sovereign command' was theoretically detached from religious and natural sources of legal validity. This was formalised by positivist theorists such as Austin[14] and Bentham[15] and was maintained in later theories of positive law through the rise of constitutionalism in the late nineteenth and early twentieth centuries.[16] The latter was

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[12] In the words of Jussi Backman, λόγος (*logos)* is seen "in the sense of an ultimate central 'meaning' that would no longer refer to anything other than itself and would thus provide a self-sufficient and permanently accessible center for discursive chains of references." See. J. Backman, "Logocentrism and the Gathering Λόγος: Heidegger, Derrida, and the Contextual Centers of Meaning." *Research in Phenomenology* 42 (2012): 70

[13] See J. Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence*. Indianapolis: Hackett Publishing Company, Inc. , 1998.

[14] *Ibid.*

[15] J. Bentham, *Of Laws in General*. Edited by H. L. A. Hart. London: Athlone Press, 1970.

[16] The latter include important thinkers such as Hans Kelsen who aimed at moving beyond the reductivist nature of classic positivist thought, from a reliance on "power and obedience" to a "basic norm" ensuring the authority of laws and constitutions through time and space. Of course such analysis is problematic for many reasons, the most important of which is the "presupposed" validity of the basic norm. This problem has been the subject of much criticism from within and outside the positivist tradition. H.L.A Hart is perhaps the most important of such critiques. Instead of locating the source of authority in a presupposed norm, Hart argues for a form of social validity (common practice and custom) amongst state and law making officials. For an overview of positivist theories and their interrelation see L. Green, "Legal Positivism." *Stanford Encyclopaedia of Philosophy*. Spring 2009. http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=legal-positivism (accessed April 4, 2013).

especially exemplified in Kelsen's identification of law's "object matter".[17] A detour in the positivist image of law will help as a final step towards the articulation of the notion of *logos*.

Positivist thinkers of the twentieth century helped solidify the 'externalisation' of the above uses/theories of *logos* into "modern" understandings of law through the concept of sovereignty. This concept plays (or at least played) a central role in the *creation* (as opposed to *formation and evolution*) of rules, ensuring their function and application to a society, and meting out justice. John Austin, one of the most influential and controversial positivist thinkers, defined "positive law" as "the appropriate subject of Jurisprudence" and characterised it as "law established or "positum", in an independent political community, by the express or tacit authority of its sovereign of supreme government."[18] As pointed out by Richard Ashley and Rob B. J. Walker, sovereignty has an inherent relationship with "some mode of being already in place, some simply and self-evidently given resolution of paradoxes of space, time and identity."[19] The detachment of this "mode of being" from the social/political context ("paradoxes of space, time and identity") was essential in order for the autonomy of law to be

[17] Kelsen in his *Pure Theory of Law* starts the section on "Legal Order", by the proposition that "A theory of law must begin by defining its object matter." H. Kelsen, *Pure Theory of Law* . New Jersey: The Lawbook Exchange Ltd., 2005.

[18] J. Austin, "The Uses of the Study of Jurisprudence." In *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence*. Indianapolis: Hackett Publishing Company Inc., 1998: 365. See also M. Freeman, *Lloyd's Introduction to Jurisprudence*. 8th. London: Sweet and Maxwell, 2008.

[19] See R.K. Ashley and R. B. J. Walker, "Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies." *International Studies Quarterly* 34 (1990): 383.

ensured.[20] Justifying this detachment in the absence of God (as the ultimate universal reference) needed a move to a different form of abstraction, i.e. science.[21]

Positivists sought to give "a notion of law as a sealed logic or system," which "dissimulates disembodied authority". [22] In the twentieth century, prominent positivists such as Kelsen and Hart helped further the legal logic of their predecessors. They sought "[a] 'science' of law [that] could only be founded on observable, objective phenomena, not on subjective and relative values."[23] This line of thought, i.e. moving from locating law's authority in 'natural' transcendence towards positive, 'science' driven law, was seen as a replacement of the word of God with that of the state, as most famously suggested by Friedrich Nietzsche.[24]

More recently Peter Fitzpatrick utilises Nietzsche's argument to develop a concept called "negative universal reference."[25] By this he is referring to the process through which 'old' transcendental sources of authority, or what he calls "positive transcendence" is supposedly "avoided" through "delimiting a targeted period or

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[20] This detachment still exists for Austin, even though he puts the internal acceptance of rules by the "independent political community." This is because *acceptance* is usually *of* something which has *authority* and is effectively detached from the "political community" which is doing the accepting. For Austin's view, see generally his series of lectures on jurisprudence in J. Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence.* Indianapolis : Hackett Publishing Company, Inc. , 1998.

[21] For an analysis, see A. Orford, "Scientific Reason and the Discipline of International Law." *European Journal of International Law* 25, no. 2 (2014): 369-385. An example of this move is Kelsen's assumption of a "presupposed" basic norm which gives a transcendental authority to "the original constitution." See generally H. Kelsen, *Pure Theory of Law.* New Jersey: The Lawbook Exchange Ltd., 2005.

[22] *R. Birla,* "Performativity between Logos and Nomos: Law, Temporality and the 'Non-Economic Analysis of Power' [hereinafter "Performativity between Logos and Nomos"]." *Columbia Journal of Gender and Law* 21, no. 2 (2011): 103. See also C. Douzinas and A., *Critical Jurisprudence: The Political Philosophy of Justice.* Oregon: Hart Publishing, 2005. Here Douzinas and Gearey point to the similarity between Hart and Kelsen, where they say that Hart argues for an understanding of law where the "systematic interdependence [of rules] determines the existence, validity and values of any particular rule." (at 6) This is a clear example of a "sealed logic" where rules draw their validity from *their own* interdependence.

[23] C. Douzinas and A. Gearey, *ibid,* at 6.

[24] Nietzsche in *Thus Spoke Zarathustra*, refers to the State as 'the regulating finger of God', and as a replacement for the 'idol' the God once was. See F. Nietzsche, *Thus Spoke Zarathustra.* London: Penguin, 2003: 76.

[25] P. Fizpatrick, "Imperial Ends." In *The Ends of History: Questioning the Stakes of Historical Reason*, by Joshua Nichols and Amy Swiffen (eds.). New York: Routledge, 2013: 46.

concept such as 'state', or 'civilized' and by ascribing content to it."[26] In other words, this concept is essentially a process through which what the content (of the concept) is *not*, acts as a "negative universal" which identifies the concept or period in question. Therefore instead of being positively associated with (or validated by) something that is defined as transcending the content (of the concept/period), the latter is universalised negatively by being differentiated from what it is not. However, this process of negation *still* positions something outside of and detached from the content which acts as a source of authority for identification, instead of the much criticised "positive transcendence". This ensures the continuing presence of an "external" source of authority which validates law as command regardless of whether it is done positively or negatively.

There is a specific notion of spatiality in operation when the authority of the law is externalised through negative universalisation. *Logos* operates on the back of a "spatial cut". This cut has been identified by legal geographers with the "closure" of law in legal formalism and "mainstream legal scholarship",[27] where "law must effect closure, and divorce itself from the "value-laden", politicised, and mercurial conditions of social life".[28] With this enclosure, the socio-spatial reality of everyday life becomes detached from law, and effectively occurs *within* a physical space.[29] Even in legal positivism which

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[26] P. Fizpatrick, *Ibid.*

[27] Legal formalism is defined by Roberto Unger as a "commitment to, and therefore also a belief in the possibility of, a method of legal justification [...] [that] characteristically invokes impersonal purposed, policies, and principles as an indispensable component of legal reasoning." R. M. Unger, "The Critical Legal Studies Movement." *Harvard Law Review* 96, no. 3 (1983): 564. On the closure of law and legal formalism see generally N. Blomely, *Law, Space and Geographies of Power*. New York: The Guilford Press, 1994: 7-11.

[28] N. Blomely, *Law, Space and Geographies of Power*. New York: The Guilford Press, 1994: 10. Both positivism and formalism are amongst the "mainstream" approaches to law, widely criticised by critical scholars such as Blomely.

[29] Legal geographers such as David Delaney and Nicolas Blomely are not the only scholars criticising the detachment of law from the socio-spatial reality. As shown in the introduction of the thesis a range of critical legal analyses, point to the disjuncture between law and the operations of power and symbolism in the socio-political realm. See for instance D. Kennedy, *A Critique of Adjudication*. London: Harvard University Press, 1997. For an application of a similar critique to international law see M. Koskenniemi, *From Apology to Utopia: the Structure of*

sought to "bring law to the earth", the socio-spatial realities formed by relations of power were detached from law through the powerful, yet unsustainable, separation of law and "politics". In other words, even though it was realised that law does not come from Nature or God, its legality was made concrete only through the institutionalisation of authority in the designated spaces of the parliament, the palace, or the royal courts of justice, and the rules applicable to a specific territory with an enclosed and delimited socio-political realm, conceptually (and physically) separated from spaces of everyday life.

This positivist sensibility is arguably central to modern notions of jurisdiction which play a key role in contemporary legal imagination. For instance, contemporary democratic theories (such as Étienne Balibar's) take note of space by seeing borders as the non-democratic condition of democracy. In these analyses, space is only accounted for in its most limited form, i.e. the physicality of the borders within which sovereign law making is to take place.[30] Here *logos* becomes jurisdiction; speaking the law through authority gained by the unchallenged fixity and separation of physical borders from the socio-political realities of everyday life *within* those boundaries.[31] It is separate and fixed because it is denied democratic process; a process which often serves as a trusted way of connecting experience of everyday life to the operations of sovereignty. Combined with the conceptual authority of sovereignty, space is detached from society.

For *logos,* spaces are not perceived as socially produced. Instead physical, spatial delimitations either come before the law (e.g. natural boundaries such as seas,

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*International Legal Argument*. Cambridge: Cambridge University Press, 2005. It is (critical) legal geography that brings my attention to the co-production of the space/social/law triad forming the central theoretical component of this thesis.

[30] É. Balibar, *We, the People of Europe?: Reflections of Transnational Citizenship*. Translated by James Swenson. Woodstock: Princeton University Press, 2004: 117. For an analysis of the different theories of space, see my exposition of debates in legal geography in chapter 1.

[31] I am borrowing the idea of jurisdiction as "speaking the law" from Shaunnagh Dorsett and Shaun McVeigh's recent reflection on the concept of jurisdiction. See S. Dorsett, and S. McVeigh, *Jurisdiction*. New York: Routledge, 2012.

mountains or rivers), or are created by law (regulation/legislation) from the detached position of legal authority (e.g. creation of councils, cities, provinces and even territorial states).[32] As put nicely by Sarat et al. "positive law derives its particular form, content, and social administration from its rootedness in a geographically defined space."[33] There is a clear distinction between what the laws are, where the laws are made and to whom they are applied.

The spatiality of *logos* is partly rooted in the way law perceives space as a container of material things *in/to* which law is applied and prescribed. However, this relation is not always seen through the lens of prescription and detached authority. Many legal geographers, especially in their early engagements with space, but arguably until today, view the relationship between law and space as a causal relationship,[34] i.e. law producing and affecting material space, and material space setting certain conditions and determining limits for law. To put it differently, in the framework of *logos,* law remains associated with a "disembodied" form of authority which situates the law *outside* what Kelsen calls the "object matter" of law. Space is then associated with this object matter and "objectified" accordingly. As a result of this, space becomes alienated from both law, and also from its socio-discursive content.

On a different but related note, *logos* operates by detaching the source of legal authority from the lived experiences of human society (territorially bounded). This detachment is characterised by one form or another of transcendence, be it in the form of Nature,[35]

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[32] I will look at this further in the following chapters regarding the way (international) law seeks to create delimited zones of cyberspace through legal mechanisms in order to be able to regulate and govern content.

[33] A. Sarat, *et al.*, "Where (or What) Is the Place of Law? An Introduction." In *The Place of Law*, edited by Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey. Michigan: The University of Michigan Press, 2003: 2.

[34] See generally D. Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* [hereinafter *"Nomospheric Investigations"*]. New York: Routledge, 2010: 12-24.

[35] For the ancient Greek theorists this took the shape of a move from laws and conventions to Nature, so that "Natural right [...] both transcends reality as an 'ideal', and can be confidently

God (Word),[36] True Knowledge (from the "thing" about which "the argument" is produced) or the "negative universal" category posed by Fitzpatrick (from the "content" ascribed to the "odolised" categories such as "state" or "civilised" and arguably, "law").[37] As a result of this separation of (legal) authority from the social and political lived reality, law is no more built into the fluidities of the socio-political context. Such fixity of laws is easy to see in religious *commandments* that take an ahistorical, asocial and aspatial character. Going back to the different categories of space outlined in chapter one, the fixity of law through *logos* is guaranteed by situating law (its authority) in a non-physical, mental or abstract space.[38]

Therefore the objective form of spatiality (as in material Cartesian space) is not the only form of space in operation in the legal imagination of *logos*. The (non-)space in which the authority of law is situated plays an important role. As shown in this chapter through my analysis of different conceptualisations of *logos* (and later vested in the idea of sovereignty and positive law) the law/space and the material/abstract (mental) binaries play an important role for our understanding of *logos*. It is exactly the persistence of these dichotomies that characterises the relationship between law and space in the legal space of *logos,* even though the theorists who used the concept of *logos* never paid direct attention to the question of space and the relationship of law to it. However, since my use of the concept is more a theoretical synthesis, I will use more

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discovered through observation and reasoning." See C. Douzinas, and A. Gearey, *Critical Jurisprudence: The Political Philosophy of Justice.* Oregon: Hart Publishing, 2005: 83

[36] As seen in Augustine's reflection on *logos,* Word and God were one and the same. See S. Augustine, "Book Seven." *Supra* note 8. From this perspective, Word is law as *logos,* which does not gain its authority from the people, society or human community, but from God. In fact, *logos is* its own authority.

[37] Fitzpatrick explains through Nietzsche's work that even though the "we killed god" as the ultimate positive universal, the state becomes (through negative universal reference) a "new idol" which "would still act like 'the ordaining finger of God'." If one combines this with Nietzsche's claim that "there is no doer behind the deed," then the state, which *acts* as the ordaining finger of God, becomes the new universal, the new idol. See generally P. Fizpatrick, "Imperial Ends." *Supra* note 25.

[38]For a discussion of space and the critical (legal) geographic intervention see generally, section 1.2.2. for discussion.

recent characterisations by legal geographers in highlighting the relation between law and space, which as Nicolas Blomely points out were prevented from being reflected upon due to what he calls the "closure" of law.[39]

Although later positivists such as Kelsen and Hart attempted to remove the reductivist character of earlier positivism by distancing normative language from statements of power and obedience (as with Bentham and Austin), they failed to fully create a connection between law and the body of people to which the law was directed. Kelsen arguably fails because of his ultimate reliance on his "presupposed" basic norm. Hart seeks to displace Austin (and make a sociological claim for law) by arguing that citizens accept rules as "standard for all who play the game" by having a "reflective critical attitude" towards them.[40] Even though this was a significant move by a positivist to embrace a sociological perspective to law, he unfortunately "reaffirms the positivist equation of law" through his focus on the customs of "the officials".[41] This reinforces the fixity of law within/toward a defined socio-epistemic and normative boundary and hence offers a limited sociology of law at best. The form of *logos* is in one way or another essentialised and fixed through its reliance on presupposed categories and boundaries (both conceptual and physical). Therefore the "assumed divide between law and social and political life that undergrids the soi-distant objectivity of law,"[42] animates the conception of *logos*.

To sum up, *logos* for this project is a disembodied form of (legal) authority which situates the law *outside* what Kelsen calls the "object matter."[43] As a result, this understanding of law has a character of "external prescription" which sees law as

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[39] N. Blomely, *Law, Space and Geographies of Power. Supra* note 28, at 7-27.
[40] H. L.A. Hart, *The Concept of Law*. 2nd. New York: Oxford University Press, 1997: 57.
[41] See N. Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream.* Oxford: Oxford University Press, 2004: 201; *and* P. Fitzpatrick, *The Mythology of Modern Law*. London: Routledge, 1992: 4.
[42] N. Blomely, *Law, Space and Geographies of Power. Supra* note 28, at xii.
[43] See H. Kelsen, *Pure Theory of Law*. *Supra* note 21.

something that is applied *to* the socio-political relations and realities, categorically separated (spatially and conceptually) from the fluid and interrelatedness of everyday life which are seen as existing *within* a bounded (territorial) entity. Therefore law and space become distinct from one another.[44] Further, within the framework of *logos* there is a binary spatial logic in operation, one which oscillates between the necessity of the physical space (territorial boundedness) for the existence of the socio-political (within), and the detachment of legal authority through a fundamental reliance on mental/abstract(ed) space, often embodied in physical entities such as the palace, parliament, and the court. In the remainder of this thesis, I will refer to this as the physical/mental spatial binary of *logos*. Therefore in *logos* law becomes about rules and norms applied to some territorially delimited space through a regulatory mind frame, taking its authority from a detached entity or category which is either imagined through physical space or as mental space. This conception of law is fundamentally backed up by conceptual distinctions between law, space and society, distinctions which I seek to question in the following section using the concept of *nomos*.

## 3.3. Law as *Nomos*: Spatial, Fluid and Lived

In contrast to *logos, nomos* is a notion of law which does not locate that to be regulated outside itself objectively. The word *nomos* is often translated from Greek as "law". The Oxford English Dictionary defines nomos as "the principles governing human conduct."[45] However a glance at the origins of the word in ancient Greece gives us a very different notion of law that differentiates it from *logos*. *Nomos* refers to the *accepted* and *conventionalised* norms and values. According to Stephen Todd and Paul Millett, *nomos*

[44] I also pointed to this distinction in chapter one when discussing the development of (critical) legal geography. Amongst the most important observations (and points of contestation) was the continued conceptual distinction between law and space, causing the impasse of legal geography.

[45] Oxford English Dictionary, http://www.oed.com/view/Entry/127770#eid34548697 (accessed 19 August, 2014)

is a term/concept/notion where law, society and politics come together.[46] This is unlike the modern *logos,* which is to a great extent a product of the separation of law (legislation) from society and politics.

In *The Nomos of the Earth,* Schmitt looks at the etymology of the word *nomos* in order to reverse the historical collapse of the word "from a spatially concrete, constitutive act of order and orientation [...] into the mere enactment of acts in line with the *ought* and, consistent with the manner of thinking of the positivistic legal system, translated with the word law [...]."[47] In other words, he argues that before it was associated with the notion of positive law, *nomos* was conceptualised as an *act* with a spatial orientation, which guaranteed the spatial specificity and concreteness of law. He identifies *nomos* with acts of "spatial ordering", specifically "an original distribution of land."[48] By connecting the apportioning of space to different 'historical epochs', he maintains a form of continuity in the act of *nomos* which according to him has been forgotten by scholarship and practice. Moreover by associating *nomos* with 'acts' prior to the law (as *ought),* he is "referring to something both more concrete, and transcendental, than the law."[49] According to Marti Koskenniemi, Schmitt's understanding of law was "both wider and narrower, and above all, more fundamental than the positive laws generated by [...] the legislative state."[50]

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[46] S. Todd, and P. Millett, "Law, Society and Athens." In *Nomos: Essays in Athenian Law, Politics and Society* , by Paul Cartledge, Paul Millett and Stephen Todd. Cambridge: Cambridge University Press, 1990: 12

[47] C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* [hereinafter "*The Nomos of the Earth*"]. New York: Telos Press , 2003: 78.

[48] For further elaboration on this idea by Schmitt, see C. Schmitt. "Appropriation/Distribution/Production: Toward a Proper Formulation of Basic Questions of any Social and Economic Order [hereinafter "Appropriation/Distribution/Production"]." *Telos* 95 (1993): 52-64.

[49] S. Legg, and A. Vasudevan. "Introduction: Geographies of Nomos." In *Spatiality, Sovereignty and Carl Schmitt: Geographies of Nomos*, edited by Stephen Legg. New York: Routledge , 2011: 2.

[50] M. Koskenniemi, "International Law as Political Theology: How to Read Nomos der Erde?" *Constellations* 11, no. 4 (2004): 496

It is helpful to situate Schmitt's understanding of *nomos* within his wider juridical/political concerns. For Schmitt, the connection between appropriation, orientation and law, is relevant for all forms of law. As he points out in his essay *Appropriation/Distribution/Production,* his concern is to respond to a lack of unity in the modern treatment of "social life" in terms of "specialisations" such as "sociological", "economic" or "juridical".[51] His work on law is characterised as a response to the positivist approach of scholars such as Kelsen who argued for a "hierarchical order in which every subsumption, every development has its fixed place."[52] Schmitt argued that this supposed fixity and *normativism* of positive/liberal legal thought, results in the indeterminacy of law. Legal determinacy was a central concern for Schmitt for a long time,[53] and he argued for a vision of law where the legal decision maker is contextually situated within the space of regulation. This achieves two things; law's connection with the people (*folk*) is kept intact and as a result the legal decision maker can ensure the concreteness of law by being situated in the unified social order.[54] However, for Schmitt, the unified social order exists within a physically delimited zone, excluded from other spaces and social orders through the political character of sovereignty. The *nomos* defined by Schmitt is constituted through the "link between localization and order" and

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[51] C. Schmitt, "Appropriation/Distribution/Production." *Supra* note *48,* at *52.*

[52] I. Ley, "Which Role for Theory in International law? Report on the Workshop 'Kelsen - Schmitt - Arendt: Constitutionalism in (International) Law'." *German Law Journal* 11 (2010): 1312. See also I. Augsberg, "Carl Schmitt's Fear: Nomos - Norm - Network." *Leiden Journal of International Law* 23, no. 4 (2010): 741-757.

[53] On Schmitt and his longing for legal determinacy, see W.E. Scheuerman, *Carl Schmitt: The End of Law*. Oxford: Rowman and Littlefield Publishers Inc., 1999: 15-38.

[54] Schmitt's desire of maintaining the connection between people and law strongly resembles the ideas of the German Historical School of the 19th century. For example such sentiments are visible in the work of Friedrich Carl von Savigny who theorised about the "organic connection of law with the being and character of the people." *See* F. C. Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence.* Translated by Abraham Hayward. London: Littlewood & co., 1831: 27. For an interesting article on Schmitt's *nomos* see, F. Jameson, "Notes on Nomos" *The South Atlantic Quarterly* 104, no. 2 (2005): 199-204. In this piece Jameson locates Schmitt's *nomos* between Marxian historiography and Heideggerian 'ontological nostalgia', and more importantly predicts difficulties for spatial structuralisation through cyberspace.

implies a zone of exclusion from law in its conceptualisation of sovereignty.[55] It is *within* these zones of exception that Schmitt promoted legal determinacy. However the act of ordering, *nomos*, is primarily a political act, given the primacy and autonomy of 'the political' for Schmitt.[56] It is this characteristic of 'the political' that gives law and *nomos* a fluidity of a political/social nature. Still, this fluidity is radically different from that which is imagined by positivist and romantic legal scholars who according to Schmitt failed to maintain the hierarchy of law without losing its autonomy to "heterarchical occasionalism" of liberal law.[57] It is the primacy and fluidity of 'the political' that gives *nomos* the character of a 'living' law, historically and spatially in flux.

The primacy of the political for Schmitt shows itself through two interrelated mechanisms; through the entire political entity (macro) and through systems within the structure (micro). Schmitt's political "defines and delimits the entire political entity (for modern Europe: the nation-state) that *protects,* as it were, the structure that allows for these other systems."[58] In other words, by defining the state of exception, the political provides the structure within which other 'systems' can exist. This structural primacy also shows itself *within* each of the systems. According to Schmitt, "[e]very religious, moral, economic, ethical, or other antithesis [...] transforms into a political one if it is sufficiently strong to group human beings effectively according to friend and enemy."[59] Therefore, the grouping of people into systems is primarily conditioned by the structural necessity of the friend/enemy distinction, and hence each grouping becomes

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[55] G. Agamben, quoted by William Rasch in W. Rasch, *Sovereignty and its Discontents: On the Primacy of Conflict and the Structure of the Political* [hereinafter *"Sovereignty and its Discontents"*]. London: Birkbeck Law Press, 2004: 137.

[56] For an analysis of Schmitt's theory of 'the political' see, W. Rasch, *Sovereignty and its Disontents. Ibid.*

[57] Augsberg describes Schmitt's fear of "a society no longer based on common grounds", a fear which Schmitt associates with the Romanticism of liberal law. Augsberg then locates this fear in what he calls the "heterarchical" connectivity of networks. See generally, I. Augsberg, "Carl Schmitt's Fear: Nomos - Norm – Network." *Supra* note 52.

[58] W. Rasch, *Sovereignty and its Discontents. supra* note 55: 10.

[59] Schmitt quoted by Rasch. *Ibid.*

a "materialisation" of the political on a "micro" level. In line with this structural perspective, one can expand this primacy to the realm of law. This partly explains why Schmitt was keen on maintaining the *connection* between the legal decision maker and the people (*folk*).[60] Arguably, this was to make sure the determinacy of law is consistent with the movements of the political, while the autonomy and hierarchy of law is kept intact.

For Schmitt, *nomos* is a periodising and a spatialising category, formed through the political act of deciding on the friend/foe distinction. Whether we agree with the applicability of the concept in explaining the contemporary global order, an order that tends to differentiate functionally rather than spatially,[61] *nomos* still holds its character as a concept of law, constantly affecting and being affected by the political and social. By seeking concreteness, it escapes transcendence, and hence maintains the authority of law, not through the creation of a separate space for law, but by situating the legal decision maker inside the space of regulation (physically).

Of course any concept which seeks spatial situatedness has a conception of space in the background, and in case of Schmitt this conception is uncontroversially a physical space, characterised by geographical delimitation, concretely situated in *land*. This association of space with land is on the one hand very similar to the spatial characteristics of *logos*. This is arguably because Schmitt's notion of law, even though socially situated, still held on to the idea that the society or the social happens within a territorially bounded sovereign entity.

My use of the concept of *nomos* is positioned in opposition to this notion of space, but holds on to Schmitt's belief in seeking concreteness through social situatedness. Before explaining this in detail in the next section, I want to focus on another influential

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[60] Early on in his career, Schmitt in "State, Movement and Folk" asserts that the solution to legal indeterminacy is ensuring the homogeneity of *folk* and ensuring State's "bindedness to the folk" (*volksgebundenheit*). For a thorough analysis of Schmitt's discussion of legal determinacy see William E. Scheuerman, "Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt." *History of Political Thought* 17, no. 4 (1996): 571-590

[61] I. Augsberg, "Carl Schmitt's Fear: Nomos - Norm – Network." *Supra* note 52.

scholar who formulated a conception of law as *nomos,* which shares Schmitt's concern for the significance of the social for the legal, but radically differs from it in its conception of spatiality.

Robert Cover's formulation of *nomos,* points even more strongly to the fluidity of the law "as convention, what is done and what is accepted."[62] He uses the term *nomos* in his classic piece *Nomos and Narrative,* where he introduces the term as the "normative universe" we live in.[63] In this formulation of *nomos*, the *experience* of living is vested in the concept of "narrative", and it is this that "locate[s] law and give[s] it meaning."[64] In other words, narrative and the life of narrative gives life to law, and without it, law loses it social meaning. Cover argues that it is through different "genres of narrative – history, fiction, tragedy, comedy–,"[65] manifested in "corpus, discourse, and interpersonal commitments,"[66] that legal meaning is created *("jurisgenesis").*[67] This understanding of *nomos* challenges the naturalisation of the 'liberal' identification of 'law' with "the professional paraphernalia of social control", which according to cover are, "but a small part of the normative universe that ought to claim our attention."[68] This "liberal" view on law is very much in line with my description of *logos,* which, as argued above through Hart's theory, relies on the detachment of the law and the "officials" who hold the

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62 R. *Birla,* "Performativity between Logos and Nomos." *Supra* note 22, at 91.

63 R.M. Cover, "The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative [hereinafter "Nomos and Narrative"]." *Harvard Law Review* 97 (1983): 4. Cover's analysis of *nomos* is essentially a theory in legal hermeneutics. This analysis is seen to resonate "with the classical sociology of Max Weber, as well as poststructuralist interventions of Foucault and Derrida." See R. Birla, "Performativity Between Logos and Nomos." *Supra* note 22, at 91. Cover's take on *nomos* is also influenced by the works of the sociologist Ronald Dworkin. Amongst the Scholars who have used Cover's understanding of *nomos* as a normative universe where creation of legal meaning is performed through narrative, is Frank Michelman who applied Cover's theory to propose new perspectives on republican constitutionalism in his work "Law's Republic." For a more direct analysis and use of Cover's theory, see F.G. Snyder, "Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law [hereinafter "Nomos, Narrative, and Adjudication"]." *William and Mary Law Review* 40, no. 5 (1999): 1623-1730.

64 R.M. Cover, "Nomos and Narrative." *Ibid,* at 4.

65 *Ibid.,* at 10.

66 *Ibid.,* at 12.

67 *Ibid.,* at 11-44.

68 R. M. Cover, "Nomos and Narrative." *Supra* note 63.

authority from the fluidity of people's experiences of sociality.[69] Inspired by the works of sociologists such as Peter Berger, he sees *nomos* as a 'meaningful' order,[70] taking shape through a "cultural medium".[71] Therefore, even though *nomos* encompasses the "the rules and principles of justice, the formal institutions of the law, and the conventions of a social order" (associated with *logos*), it does not limit the experience and life of law to the detached spaces of authority associated with *logos*.

Cover's *nomos,* or normative universe, is a world both "created" and "maintained" through two processes called *paideic* and *imperial* respectively. By the former, Cover refers to a body of common precepts and constituted directions, characterising the process through which the individual and community "work out the implications of their law."[72] This community oriented pattern through which "corpus, discourse, and interpersonal commitments" are combined, simultaneously creates and challenges commonalities of legal meaning established within a society. In other words a *nomos* created solely by *paideic* patterns is essentially unstable and arguably chaotic. In other words "the obvious result of all this paideic world-creation is chaos."[73] Even though it is out of commonality, that a *paideic* normative world is "created", the "unification of meaning that stands at its [the *paideic* normative order] centre exists only for an instant,

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[69] See note 41 above and the accompanying text.

[70] See footnote 2 at R. M. Cover, "Nomos and Narrative." *Supra* note 63, at 4. In his attempt to theorise (sociologically) the relationship between religion and what he calls "world-building." Peter Berger puts the concept of *nomos* as "[a] meaningful order [...] imposed upon the discrete experiences and meanings of individuals" and argues that "the individual is provided by society with various methods to stave off the nightmare world of anomy and to stay within the safe boundaries of the established nomos." Berger, Peter L. *The Sacred Canopy: Elements of a Sociological Theory of Religion.* New York: Anchor Books, 1990: 19-24. In a footnote to his text, Berger further points to the origin of his use of the term *nomos*, the work of the late 19th Century sociologist Emile Durkheim. In his own words "the term "nomos" is indirectly derived from Durkheim by, as it were, turning around his concept of *anomie."* This latter concept means a situation where bonds between the individual and society are broken. *Nomos* then is a concept used to theorise those very bonds which 'order' the relations and experiences within a society. It is following this conceptualisation that Cover associates a central role to narrative in the formation of these social bonds. One could go even further and say that the narratives *are* the bonds.

[71] R.M. Cover, "Nomos and Narrative." *Ibid*, at 11.

[72] *Ibid*., at 13.

[73] F.G. Snyder, "Nomos, Narrative, and Adjudication." *Supra* note 63, at 1633.

and that instant is itself imaginary."[74] This is a situation where fluidity of a legal order tends towards normative disorder. However Cover's notion of *nomos* does not end with perpetual instability and temporality of law.

The second pattern present in any stable *nomos* is the *imperial*. This is a model in which "norms are universal and *enforced* by [social] institutions";[75] a system where norms are applied in an "impartial and neutral" way, and "discourse is premised on objectivity – upon which is external to the discourse itself."[76] In the normatively diverse and arguably chaotic world of *paideic* order, it is the imperial that seeks to stop the imagined order from disintegrating, and it does this through the "psychological motif [of] separation."[77] In other words by imposing certain organising principles, society achieves stability at the price of the production of normative meaning. However, even though "the precepts we call law are marked off by social control [...], the narratives that create and reveal patterns of commitment, resistance, and understanding [...] are radically uncontrolled."[78] In other words, the precepts go through different narrative traditions which take away unity of meaning from them and make them essentially contested. At this point, Cover argues that in a liberal society, control is disclaimed over narrative and the contested nature of order is ignored.[79]

Significant about these two accounts of *nomos* in this chapter and the wider thesis are the shared characteristics which conceptually shape *nomos*. Speaking of similarities between Schmitt and Cover goes beyond the mere sharing of a word in their analysis. Their conceptual framework of *nomos,* or more generally their views about order and law, shares a sociological grounding of norms' validity and determinacy. In addition, both their theories are reactions to the liberal formulations of law. Firstly, there is a

[74] R.M. Cover, "Nomos and Narrative." *supra* note 63, at 15.
[75] *Ibid.,* at 13.
[76] *Ibid.*
[77] *Ibid.,* at 16.
[78] *Ibid.,* at 17.
[79] *Ibid.,* at 18.

connection between the Cover's idea of "corpus, discourse, and interpersonal commitments," and Schmitt's much championed image of "people" (*folk*).[80] One can argue that Cover's *jurisgenesis* takes place within a *folk* as well.[81] For Cover, "the normative universe is held together by the force of interpretive commitments – some small and private, others immense and public."[82] As such, the existence and the contingencies of society are an inherent part of both their theories of *nomos*.

In addition to this, Cover clearly states that *nomos* and the creation of legal meaning "takes place always through an essentially cultural medium."[83] The mediums through which *nomos* is seen an act of spatial ordering and/or *jurisgenesis,* are different between Schmitt and Cover. However, the creative force of the social, political and/or the collective is recognised as the vital element in the formation of the normative universe by both authors. This is visible in Schmitt's approach to both domestic law and what he calls "the *nomos* of the Earth." As a result, they both create an understanding of *nomos* as a concept of law which escapes the transcendence of legal meaning, and seek to create a legal order in touch with the socio/political reality in which the law is to operate. So for both scholars, the space of the regulator and the regulated is to a great extent overlapping. This overlap is a central condition for both Schmitt and Cover for the validity, legitimacy and meaningfulness of law. Therefore, what they do through *nomos* is to emphasise the centrality of law as something which is more than just regulation but is indeed embedded in everyday social experience. They differ however, in how they characterise this overlap, which for Schmitt is purely physical, and for Cover "otherworldly". In the next section, I will expand on this in order to distinguish my

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[80] Schmitt's quote on the relation of "folk" and law, see note 60.
[81] Cover also refers to the centrality of "folk" as the place where the dichotomy of law as power and law as meaning manifests itself. See R. M. Cover, "Nomos and Narrative." *Supra* note 63, at 18.
[82] *Ibid.*, at 7.
[83] *Ibid.,* at 11.

approach to *nomos* from the two scholars, and thus offering a working definition of the concept for this project.

### *3.3.1. Schmitt, Cover and the "Spatial"*

In an insightful observation regarding Schmitt's and Cover's understandings of *nomos,* Delaney argues that for the latter "the spatial and material characteristics of worlds are ignored or given a mystical, otherworldly inflection", and for the former "concrete spatiality is foregrounded."[84] When Schmitt argues that "law is bound to the earth and related to the earth," he is certainly referring to space in its most concrete sense. In his formulation, law is conditioned solely by physical spatiality, and social spaces are not explicitly recognised. For Cover *nomos* is a normative universe which is separated from "the physical universe of mass, energy and momentum", and this is diagrammatically different to Schmitt's understanding of *nomos* as an essentially spatial order. In Delaney's words, "Cover's [*nomos*] is a comparatively spectral, dematerialized and anemic nomos."[85] Even if these two thinkers (Schmitt and Cover) share "a largely unexplicated and unproblematized notion of 'community'," Schmitt's reliance on a "flat, static inside/outside" orientation and Cover's sole focus on dematerialised "normative commitments" for the generation of legal meaning, renders their *nomos* ambivalent regarding law which is always lived, performed and experienced within the socio-spatial materiality. This is the reason why I am in agreement with Delaney that the relation between spatiality and law should go beyond *nomos* as theorised by Schmitt and Cover. However, even though Delaney uses neologisms ("nomicity" and "nomosphericity") to do this, I will continue referring to it as *nomos*; another theoretical synthesis (like *logos*) which I shall build upon and further clarify (especially regarding space) in the following chapter(s).

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[84] D. Delaney, *"Nomospheric Investigations." Supra* note 34, at 31-33.
[85] *Ibid.,* at 31.

Therefore, in this analysis, *nomos* is a conception of law influenced by, but also different from, Schmitt's and Cover's projects in which *nomos* plays a fundamental role. The first characteristic of *nomos* in this project is strongly influenced by the two abovementioned theories and that is an understanding of law rooted and situated within a "community" or social experience. This community oriented theory of law leads to the second characteristic, and that is normative fluidity as opposed to the fixity of *logos* explained above. In the case of Cover legal meaning oscillates through narrative traditions of the community, in order to create epistemic commonalities, is a state of constant flow. This is also seen in Schmitt's connecting of *nomos* to the processes of appropriation, distribution and production.[86] Arguably more important is Schmitt's historical analysis of the international order in "*Nomos* of the Earth", where he situates *nomos* in a spatio-temporally fluid framework, produced and re-formulated through different eras and as a result of "new spatial phenomen[a]" such as the "free sea".[87] However the fluidity derived from Cover and Schmitt's *nomos* is either spatially mystified (Cover) or is "contained" (Schmitt) and this is where my understanding and use of *nomos* is different and closer to Delaney's "nomicity".[88] For this project, *nomos* aims to go beyond the concrete spatiality of Schmitt, and the Cover's dematerialisation of the normative universe.

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[86] Schmitt argues that "the close proximity, the sequence and changing evaluation of the three basic categories of appropriation, distribution and production inherent in every concrete *nomos* and latent in all legal, economic and social systems [...]." See C. Schmitt, "Appropriation/Distribution/Production." *Supra* note 48, at 55.

[87] C. Schmitt, *Nomos of the Earth. Supra* note 47, at 48.

[88] Delaney promotes the idea of "nomicity" as a concept which "is at least as concerned with issues of materiality and performativity as with "interpretive commitments" and normativity", and is also "informed by a richer and more self-consciously problematizing spatial imaginary." See D. Delaney, *Nomospheric Investigations. Supra* note 34, at 31. I will draw on this notion further in the next chapter where I expand my understanding of spatiality with respect to cyberspace and law.

### *3.3.2. Beyond the Physical/Mental Binary*

Perceiving the world of law as *nomos* not only means seeing space as socially produced, performed, and materially situated, but also a concept which goes beyond the law/space and space/society binaries. In order to remove the aforementioned binaries, and connect the community oriented notion of the legal in Schmitt and Cover, with a fluid and co-produced notion of space, I find three theorists particularly useful, namely Delaney, Foucault and Massey. Apart from Delaney who is a self acclaimed legal geographer, the latter two do not outline their theory of space through an analysis of the "legal". Nonetheless, all three theories and approaches have a key quality in common, and that is looking at the social through the plurality and multiplicity of human lived experience (performativity in the case of Delaney), and hence allowing us to further challenge fundamental assumptions about space, law and society, and their respective relationship to one another (largely dominated by *logos*). In the remainder of this chapter I shall focus on these theories in order to take the final step in the construction of *nomos* as a conceptual framework which allows us to best understand and observe the relation between the legal, the social and the spatial.

Building on his critique of Schmitt and Cover, Delaney offers one of the most important and overarching critical engagements with the field of legal geography. As I pointed out in chapter one, Delaney argues that legal geography is at a critical impasse, which is characterised by a continuing divide between physical and abstract conceptions of space, and hence maintaining the conceptual distinction between law (abstract/mental/discursive) and space (real/physical/material).[89] In his attempt to provide "an account of how space [...] is produced through human agency," he develops

[89] For a brief explanation of what Delaney means by the impasse, see chapter one, notes 60-61 and the accompanying text. Alternatively see D. Delaney, *Nomospheric Investigations*. *Ibid.,* at 12-24.

specific neologisms the most important of which is *nomosphere*.[90] He defines this spatio-legal term as "the cultural-material environs that are constituted by the *reciprocal materialization* of 'the legal', and the legal signification of the 'socio-spatial', and the practical, performative engagements through which such *constitutive moments* happen and unfold."[91] In order to further elaborate on the relation of Delaney's theory to the notion of *nomos* used in this project, I shall briefly expand on how he offers a fundamental reconsideration of our understanding of both law and space through his critical strategy of "rotating" the terms/concepts "legal", "spatial" and "material". Understanding this critical move, especially with regards to the latter is vital to challenging (in chapter four) the ways (international) law perceives cyberspace as space.

In a manner similar to a number of critical (legal) geographers (such as Edward Soja), Delaney wishes to move beyond the conventional association of space with the three dimensional, Cartesian understanding of materiality. Arguing that this is too restrictive, he seeks to "rotate" space by defining it as "imagined", "discursively organised" and

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[90] This is not the first time neologisms of this sort, i.e. aimed at creating spatial categories that operate beyond the conventional binaries of law and space, have been used by critical legal geographers. A key precursor to *Nomosphere*, was Nicolas Blomely's "splice" (noun) and "splicing" (verb), in N. Blomley, "From 'What?' to 'So What?': Law and Geography in Retrospect." In *Law and Geography*, edited by Jane Holder and Carolyn Harrison, 17-33. Oxford University Press, 2003. Both these neologisms are arguably attempts at theoretically framing an earlier observation of the legal geography tradition, namely that ""law" and "geography" do not name discrete factors that shape some third pre-legal, aspatial entity called society. Rather the legal and the spatial are, in significant ways, aspects of each other." See N. Blomely, *et al.* (eds.). *The Legal Geographies Reader: Law, Power, and Space*. Oxford: Blackwell Publishers, 2001: xviii. For a more recent perspective see A. Philippopoulos-Mihalopoulos, "Law's Spatial Turn: Geography, Justice and a Certain Fear of Space." *Law, Culture and the Humanities* 7 (2011): 187-197.

[91] D. Delaney, *Nomospheric Investigations*. *Supra* note 34, at 25. [Emphasis added] One thing Delaney does not clarify in his theoretical voyage is what he exactly means by "performativity", a term which has played an important role to post-structural thought in the past two decades (with the works of people such as Jacque Derrida and Judith Butler) but is not in any way limited to this school of thought. Importantly one should point to the founding work of theorists such as J. L. Austin, who arguably set the foundation of this pervasive terminology. Although he never used the exact term of "performativity", he defines the performative as "derived, of course, from 'perform', the usual verb which is the noun 'action': it indicates that the issuing of the [verbal] utterance is the performing of an action – it is not normally thought of as just saying something." (at 6-7) According to Austin, performativity is the creator of the everyday organic world. See generally J. L. Austin, *How to Do Things with Words*. Oxford: The Clarendon Press, 1962.

"performed".[92] The focus on performativity, discourse and imagination not only challenges the reduction of space to the physical, it also displaces any reliance on an abstracted notion of spatiality, both central to the concept of *logos* developed above. These three characteristics provide us with a framework which has speech and action as the fundamental determinants of the *how* and the *what* of space. In other words spatialities are "produced, reproduced and transformed" through human experience and consciousness. To put it in Soja's words, Delaney's rotation presents space as a "fundamental referent of social being."[93]

Delaney also aims to broaden the *legal* beyond what "conventional legal thought" has to offer us.[94] What he calls "rotating the legal" suggests that "the legal is always happening. It is performed not only by those we identify as "legal actors"… but by everyone who acts in accordance with (or with transgressive reference to) understandings of rules, authority, rights, permissions, prohibitions, duties, and so on."[95] This representation of the legal is key for understanding the concept of *nomos*. On the one hand it challenges the detachment of law and legal authority observed in *logos*. By transferring the (authority of) the legal from the doer to the *doing* (the performativity of "*act[ing]* in accordance (or with transgressive *reference* to)"), he is re-theorising law away from the disembodied forms of authority which situated the law *outside* the "object matter" of the law (*logos*). He also broadens legality from the limited sociology of Austin ("the officials" or what Cover refers to as the "professional paraphernalia of social control") to a plural

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[92] D. Delaney, *Nomospheric Investigations*. *Ibid*, at 15.
[93] E. W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory*. London: Verso, 1989: 119. See generally, for discussion of the shift in the development of spatial theory, section 1.2.2.
[94] This goal is not unique to Delaney's project. Displacing and "broadening the legal" is in line with most critical legal scholarship and the legal geography of the past 2-3 decades. See for instance, D. Kennedy, *A Critique of Adjudication*. London: Harvard University Press, 1997.
[95] D. Delaney, *Nomospheric Investigations*. *Supra* note 34, at 19.

and ever changing *happening* and *doing,* deeply intertwined with the sociality of everyday life.

For Delaney, at the heart of changing our perception of the legal and the spatial, we should "rotate" the "material". It is through a re-conceptualisation of materiality that Delaney completes the conceptual framework needed for overcoming the impasse pointed out earlier. When Delaney speaks of "cultural-material environs", by *material* he is not referring to objectively imagined things. Instead, following the (re)definition by Karen Dale, materiality is seen as "imbued with culture, language, imagination, memory; it cannot be reduced to mere object or objectivity."[96] Moreover and crucial to the central role of materiality in the space, law, society triangle, is the observation that "it is not just that materiality has taken on social [read legal] meanings, but that humans enact social [legal] agency through a materiality which simultaneously shapes the nature of that social agency."[97] The mutual constitution of social agency and materiality both take place through an "enactment" or performativity which is the key to moving away from the binary of law and space. This notion of performativity is similar to the one discussed above in my analysis of Delaney's rotated legal. Through the rotated notion of materiality, Delaney connects the co-production of both law and space to human sociality and the performative experience/space of everyday life. It is through this

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[96] K. Dale, "Building a Social Materiality: Spatiality and Embodied Politics in Organizational Control." *Organization* 12, no. 5 (2005): 652, discussed in D. Delaney, *Nomospheric Investigations*. *Supra* note 34, at 20. The re-conceptualisation of materiality and discursivity in terms of one another is a move which has its roots in many post-structural theories of the late 20th century, amongst which one can point to thinkers such Judith Butler and the material/discursive realm of her theory of performativity. Similarly Karen Barad argues that "materiality is discursive [...] just as discursive practices are always already material [...] the relationship between the material and the discursive is one of mutual entailment." See K. Barad, "Posthumanist Performativity: Toward an Understanding of How Matter Comes to Matter." *Signs* 28, no. 3 (2003): 822. I will expand further on this in the chapter four when I reflect on the alternative spatial imaginings law can embrace when dealing with the spatiality of cyberspace; i.e. in exploring the useful perspective in order to perform the spatio-legal rotations proposed by Delaney.

[97] K. Dale, *ibid.*

rotation, that Delaney ensures law and space are neither purely discursive (mental) nor material (physical).

Building the materiality of everyday human experience in the construction of space is also seen in Foucault and Massey. The theory of *heterotopia* is a particularly important attempt by Foucault to construct a theory of space which is neither purely physical and locatable, nor completely imaginary and "utopian".[98] Foucault defines heterotopia as:

> real places [...] which are something like counter-sites, a kind of effectively enacted utopia in which the real sites, all the other real sites that can be found within the culture, are simultaneously represented, contested, and inverted. Places of this kind are *outside of all places, even though it may be possible to indicate their location in reality.*[99]

Foucault further elaborates on heterotopias by arguing that they are functional and their functions change through time and social context. Moreover, these spaces are also able to have a multiplicity of spaces juxtaposed "in" them. Finally an important characteristic of heterotopias is that it is theorised as having "a function *in relation* to all the space that remains."[100] Therefore, one the one hand, unlike utopias, it is not completely detached from all other spaces, and on the other it is simultaneously physically and functionally connected (relational), distinguishable and countering what Foucault calls "all other real sites", which can themselves be heterotopias.[101]

Hetherington, in an important articulation of heterotopia, understands it as "spaces of an alternate ordering."[102] Heterotopias, such as a mirror,[103] have direct links to the "real"

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98 M. Foucault, *Of Other Spaces: Utopias and Heterotopias.* March 1967. http://foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html (accessed March 25, 2011).
99 *Ibid.*
100 *Ibid.*[Emphasis added]
101 *Ibid.*
102 K. Hetherington, *The Badlands of Modernity: Heterotopia and Social Ordering.* London: Routledge, 1997: 9.

spaces and things around us in addition to our embodied cognition. They are alternate orderings rooted within a locality. The experience of sociality is conceptually central to the construction and development of heterotopias.[104] What is meaningful and nonsensical are decided discursively amongst people, communities and societies, through human interaction and communication. The centrality of discourse to social meaningfulness makes communications and discourse also central to the concept of sociality. The concept of heterotopia helps us understand "nonsensical" spatiality.[105] What might seem heterotopic to some might seem real or meaningful to others.

Heterotopia offers us a way of questioning and challenging the binaries of spatiality which are not only fundamental to the concept of *logos,* but also to the place of the "spatial" within Schmitt and Cover's theorisations of *nomos*. By placing the discursive nature of meaningfulness at the heart of spatial organisation, Foucault theorises space within the fluid context of everyday social experience only loosely tied to a territorial locale. In addition, as Dianna Saco points out, heterotopia is "a space that mimics or simulates lived spaces, but that in so doing, calls those spaces we live in into question."[106] At the centre of this is a view of space as continuously interacting with both the "real" and the discursive and through its perfomativity (as in Delaney's theory) challenging the very essence of dichotomous approaches to space (*logos*). Through

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[103] The first example of a heterotopia mentioned by Foucault is a mirror, which act as a form of "utopia" which also "does exist in reality, where it exerts a sort of counteraction on the position" one occupies.

[104] The "Realm of sociability", it is argued, "extends beyond the family to the networks of friends, peers, and other social relations." M. Castells, *et al., Mobile Communication and Society: A Global Perspective*. Cambridge MA: MIT Press, 2007: 91. The definition of the social, society, and sociality are amongst the most central concepts not only to sociology but to other disciplines such as law, politics and anthropology to name but a few. However, covering the depth of the discussions on this topic would certainly fall outside the scope of this thesis. Nonetheless, I have so far tried to implicitly construct an understanding of sociality. My understanding revolves around the complex phenomenon of human communication and interaction, and the resulting *social experiences*. In other words I take sociality to include any form of interaction and communication either resulting in, or already part of, a community.

[105] D. Saco, *Cybering Democracy: Public Space and the Internet* [hereinafter "*Cybering Democracy*"]. London: University of Minnesota Press, 2002: 13.

[106] *Ibid.,* at 16.

heterotopia, the spatial and the social come to together fill the conceptual space between them with a combination of social discourse and inter-relational social fluidity. Even though on the surface, this is not directly legal, it helps further build the conceptual ground for collapsing the distinction between law and space, which is central to my understanding of *nomos*.

Finally, having a similar intention in mind, i.e. highlighting notions of spatiality which have co-constituted sociality at the heart of their epistemological and ontological production, I wish to point to the rich scholarship of Doreen Massey regarding the nature of space and its political implications. Massey attempts "to make the case for an alternative approach to space."[107] Although she humbly reminds the reader of the similarity between her spatial theory and the "recent anglophone geographical literature", it is her explicit reliance on concepts such as "relations-between", "interrelations", and "plurality" that makes her work most useful for this project and distinguishes my use of *nomos* from the understandings offered by Schmitt and Cover. Similar to Foucault's heterotopias, Massey's understanding of space has an "in-betweenness", as "neither a container for always-already constituted identities nor a completed closure of holism."[108] According to Massey, this in-betweenness is characterised by interrelations amongst a plurality or multiplicity of material practices, which is "always under construction" and hence never "closed".[109] She highlights that:

> [i]n this open interactional space there are always connections yet to be made, juxtapositions yet to flower into interaction (or not, for not all potential connections have to be established), relations which may or may not be

[107] D. Massey, *For Space*. London: Sage Publications Ltd, 2005: 9.
[108] *Ibid.,* at 12.
[109] For an overview of Massey's argument, see Anderson, Ben. "For Space (2005): Doreen Massey." In *Key Texts in Human Geography*, edited by Phil Hubbard, Rob Kitichin and Gill Valentine, 225-234. London: Sage Publication Ltd., 2008.

> accomplished. Here, then, space is indeed a product of relations [...] and for that to be so there must be multiplicity [...][110]

The focus on the connection between material practices *par excellence* and the inter-relationality of discourse, points to a shared sensibility regarding the essential ingredients of the multiplicity of spatial production; a characteristic visible in both Delaney and Foucault's account of space. Chris Butler reflects on this through the re-description of Lefebvre's notion of "spatial practice".[111] Butler argues that "*Spatial Practice* constitutes the physical practices, everyday routines, networks and pathways through which the totality of social life is reproduced."[112] In order for *nomos* to embrace and encapsulate the fluidity of everyday life and avoid the mental/physical binary, it is vital to theorise space through an interrelational connection between the physical, the social and the discursive through the idea of *practice*.

To sum up, *nomos* is a mode of analysis in which the legal and the spatial are seen as inherently intertwined and co-constituted through the fluidity of the social. As opposed to *logos*, *nomos* allows us to, on the one hand, rid ourselves of the law/space binary, and on the other hand (and as a result), avoid collapsing our understanding of space back on a physical/mental binary. Within the framework of *nomos,* the socio-spatial and the socio-legal together *become* spatio-legal through what can be characterised as a process of co-production;[113] a process which renders law and space fundamentally interrelated but yet identifiable. *Nomos* is space and law at the same time. Using the spatial theories of Delaney, Foucault and Massey, I sought to prevent the collapse of Schmitt's and Cover's theories of *nomos* into either territory or abstraction. In *nomos,* spaces are no

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[110] D. Massey, *For Space*. *Supra* note 107, at 11-12.
[111] For a description of Lefebvre's theory of space see C. Butler, *Henri Lefebvre: Spatial Politics, Everyday Life and the Rights to the City*. New York: Routledge, 2012: 9-54.
[112] *Ibid.,* at 16
[113] For a discussion of how co-production differs from production, see chapter one, notes 55-59 and the accompanying text.

longer "simply locations or stages *upon* which situations happen."[114] Nor are they "pre-existing empty container[s] [...] *into* which legal meanings have been poured."[115] Instead, law and space are *lived* and *co-produced* simultaneously through the multiplicity of social experiences of everyday life.

## 3.4. Conclusion

This chapter provides my thesis with its central theoretical framework. In order to be able to intervene critically in the overlap between cyberspace, international law and social movements, I needed to find a critical language so that the legal, the social and the spatial are all reflected upon through two central concepts. The dichotomous framework of *logos* and *nomos* serves this purpose perfectly. However, in order for this distinction to be fit for purpose, I needed to synthesise a number of different takes on these concepts, since they are both widely used and differently interpreted across time.

This project is a theoretical exploration aimed at suggesting a critical re-description of international law using cyberspace to demonstrate the inadequacy of current theories of international law to capture the increasing non-territoriality of social experience around the world. Therefore, as the next step of my analysis, having elaborated on the central theoretical framework of my analysis, I will use the two concepts of *logos* and *nomos* in order to provide an alternative description of cyberspace from a legal, social and spatial perspective. It is with this re-description in mind, and holding on to the two modes of analysis provided in this chapter, that I proceed with the remainder of this thesis, making the case for a fundamental re-conceptualisation of the socio-spatiality of international law.

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[114] D. Delaney, *Nomospheric Investigations. Supra* note 34, at 63.
[115] *Ibid.*

# Chapter 4 – Cyberspace, International Law and Space: A Re-Description

*Cyberspace exists insofar as it can be said to exist, by virtue of human agency.*

*W. Gibson*

## 4.1. Introduction

In the previous chapter, I constructed a theoretical framework around the two concepts of *logos* and *nomos* for conceptualising the relation between law, space and society. In this chapter, I utilise this theoretical framework and bring it to bear upon the (international) legal understanding of cyberspace discussed in the second chapter.

This chapter is a turning point in my analysis since it is the first of three chapters, which apply the distinction between *logos* and *nomos* to three interrelated concepts/categories, namely, cyberspace, the "international" and social movements. To reiterate a point made in the introductory chapter, for this thesis the relation between these concepts/categories stems from the close relationship between social movements and cyberspace in the contemporary era. This observation combined with the sensibility provided by the social movements and international law literature regarding the co-constituted nature of the two (e.g. by Balakrishnan Rajagopal), puts cyberspace in a direct relationship with international law. However, this relationship has not been theorised by international law scholarship so far. This chapter provides the first step to this analysis, which is ultimately aimed at questioning and destabilising the predominant ways the socio-spatiality of the "international" is treated in international law. In addition, this chapter importantly substantiates the difference between the Internet and cyberspace through the *logos/nomos* distinction.

In contrast to approaches which equate cyberspace with the Internet and treat it as an object of regulation, in this chapter I re-describe cyberspace using the analytical framework of *nomos*. This entails, first and foremost, dealing with "content" not as a filler of empty space to be dealt with by regulation, but rather a set of complex socio-spatial phenomena to be engaged with. The re-description provided will conceive of cyberspace as a fluid non-territorial socio-spatiality, or a co-constituted "international" socio-spatial experience.

This chapter proceeds in the following way. In the first section, I will draw on the descriptions of the second chapter regarding the international regulatory/governance mechanisms of the Internet and the debates surrounding it, in order to reflect on the theoretical framework they imply (*logos*). Following this, I will proceed to re-describe cyberspace beyond the Internet (*logos*) through the spatio-legal insights provided by *nomos* and its theoretical components. I will finally move to examining the kind of possibilities that a re-desciption through *nomos* provides international law, arguing that it has the potential to provide conceptual access to the non-territorial social interactions and experiences which characterise an increasing portion of everyday life around the world. I will conclude by offering some preliminary reflections on the critical potential(s) provided by this re-description and the socio-spatial access it provides us, to the wider discipline of international law.

## 4.2. International Law and Cyberspace: the Dominance of *Logos*

The role of international law with regards to the Internet have so far crystallised in two main forms; international multistakeholder institutions, and intergovernmental governance (both treaty arrangements and intergovernmental institutions like the UN).[1]

[1] I am using international law here in a broad sense, consistent with the observations discussed in the previous chapter.

I further emphasised, in the different sections of chapter two, that all these forms are characterised by what I called an "obsession with regulation" even though "governance" has been the preferred term for legal engagement since the earliest days of the Internet. The argument here is that the two types of international legal engagement spelled out can be categorised as *logos*.

From the late 1980s, international institutions played a central role in the governance and development of the Internet, its standards and regulations. In other words, they have been the main forum through which law has engaged with the Internet on a cross-border scale.[2] The growing consensus amongst these institutions, at least since the early 2000s,[3] was and remains that a multistakeholder approach, where all stakeholders take an active role in the regulatory processes, is the most suitable governance method for the Internet.[4] This consensus was partly the result of the arguments against the sole control of states over the Internet given the multiplicity of actors and limitations of state jurisdiction in an essentially borderless (at least within the definitions of international law) space. Although there are great merits in taking a multistakeholder stance, the regulatory regime takes a one directional approach toward the Internet.[5] By

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[2] Consistent with the use of law in the previous chapter, I am referring to law in a broad sense to include rules, norms, principles, standards, etc.

[3] Multistakeholderism was not invented in the early 2000s. Especially in the case of Internet governance, institutions such as the Internet Society and ICANN have operated a multistakeholder governance system from the 1990s.

[4] I should note here that not everyone regards multistakeholderism as the best approach to Internet governance. The growing concern amongst many scholars is the this approach has many limitations, and if it is to play a continued leading role in setting the foreground for inclusive and transparent Internet governance, certain practical and definitional changes should take place. See for instance, W. Drake, "Multistakeholderism: Internal Limitations and External Limits." *MIND: Co:llaboratory Discussion Paper Series*, September 2011: 68-73; *and* F. Musiani, "WSIS+10: The Self-Praising Feast of Multi-stakeholderism in Internet Governance." *Internet Policy Review* 2, no. 2 (2013): 1-7.

[5] Of course there are other limitations to the multistakeholder approach. As shown also in chapter three, issues of finance, technicalities and time are amongst the many issues. In the words of Waz and Weiser, "not every potential stakeholder has the financial wherewithal, the technical expertise, or the ability to commit time and talent to participate in the large and growing number of multistakeholder organizations." (at 337) For a general discussion of the processes of multistakeholder Internet governance see J. Waz, and P. Weiser, "Internet

including different actors in a regulatory authority or creating inclusive but yet selective forums, the relation between the law and the regulated space remains as a form of "external prescription". The actors or stakeholders, who in one way or another are involved in the management and norm making in and about cyberspace are located through certain procedures and requirements in a position in which they can agree on or decide on norms or norm making principles. There is no better place to look for this than the definition of IG agreed upon in the WSIS process.

To recall from the previous chapter, Internet governance was defined as "the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet."[6] This is admittedly a rather vague and general definition. But seen through the practice of the IGF, the main characteristics of *logos* (fixity of the legal and the spatio-legal detachment of authority) come through. The existence of a specified forum (meeting in a specific place),[7] through which decisions are made and laws/regulations/standards are fixed regarding both the form and the content of the Internet,[8] locates multistakeholderism nicely within the spatial characteristic of *logos*. Within this system, stakeholders who have the means and opportunity to engage in multistakeholder governance are externalised from cyberspace, carrying their respective roles into a created forum such as the WGIG or the IGF, and treat cyberspace as a "norm object" which requires legal intervention to ensure its smooth evolution and use.

However, given the fact that multistakeholder forums generally do not have a (hard) law making capacity and the forums act as discussion platforms rather than law making

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Governance: The Role of Multistakeholder Organisation." *Journal of Telecommunications and High Technology Law* 10, no. 2 (2013): 331-350.

[6] WSIS. *Tunis Agenda for the Information Society*. WSIS-05/TUNIS/DOC/6(Rev.1)-E, Tunis: ITU, 2005. http://www.itu.int/wsis/docs2/tunis/off/6rev1.html (accessed August 20, 2014)

[7] The IGF has met in different places/cities (Athens, Nairobi, Bali, etc.) each year since 2006.

[8] See sections 2.3.1. for a description, and 4.2. for a discussion of multistakeholder governance.

bodies, the rules and norms are still made and applied by the civil society, the private sector and most importantly by governments. If rules and decision making procedures are agreed to, they then become part of a legal regime which becomes self referential in nature and continues to objectify cyberspace. The multistakeholder governance approach is to achieve, on a transnational level, "shared principles, norms, rules, decision-making procedures", which will then be *applied to* cyberspace. Apart from the objectification of cyberspace either as a fixed structure or a container, the authority of the decision makers and the actors become *fixed* and *detached* spatially, temporally and conceptually from the everyday life and spatiality of cyberspace.[9] This means that whenever cyberspace becomes the subject of international law, it is treated as an *objectified thing,* the norms and principles of which the stakeholders are to decide upon. The inclusivity of multistakeholderism as a transnational process only reinforces the detachment (both spatial and normative) of the traditional players (standard setting institutions and governments). By including the vague categories of "civil society" and "private sector" in the process, they are separated from the context within which the normative order is to be lived. Whether or not the multistakeholder governance is successful at inclusiveness and/or hard norm making, it still fits the conception of *logos* described above.

However, as has been shown in recent debates on telecommunications regulation,[10] multistakeholderism is not always viewed as the most inclusive and desirable approach to Internet governance. It is often viewed with suspicion by critics of Western

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[9] In the next section, I will explore the idea of cyberspace as a lived space of multiple social experiences, with neither an inside nor an outside but intertwined with the socio-spatiality of our everyday lives.

[10]For example, in the 2012 World Conference on International Telecommunications (WCIT-12). See D. P. Fidler, "Internet Governance and International Law: The Controversy Concerning Revision of the International Telecommunication Regulations." *ASIL Insights* 17, no. 6 (February 2013). See also C. Arthur, "Internet Remains Unregulated after UN Treaty Blocked." *The Guardian.* 14 December 2012. http://www.guardian.co.uk/technology/2012/dec/14/telecoms-treaty-internet-unregulated (accessed April 17, 2013).

dominance over issues of global Internet governance. As a reaction to such dominance, governance through a hybrid of national and intergovernmental organisations/institutions has become a favoured option by many countries within the "developing world".[11] Perhaps another reason for this is the relative failure of multistakeholderism to offer any practical solutions to certain problems, especially ones that involve content. Intergovernmental legal mechanisms for the Internet are very limited but they are certainly gaining importance in recent years with the increased involvement of UN agencies such as ITU and UNESCO, and the calls for the expansion of treaty arrangements regarding the Internet.

Most content issues are relegated to or imagined as problems of national courts (human rights obligations, privacy and conflict of laws). Even in the rare occasion of having a proper international treaty such as the Budapest Convention, the content of the Internet is imagined to be stored within this container-like space which is "filled" and "accessed" by criminals who reside in a territorial state. Similarly in the case of the WTO/WIPO dispute resolution between states again, even if the sociality of cyberspace (resulting from content *and* interaction) is considered by international legal mechanisms, it is localised within a territorial state so that it can be brought to the dispute resolution forums within these institutions. Of course, there is no problem as such with this approach, given that there are real issues to be dealt with regarding content, and given the lack of enforcement mechanisms for international law, national courts (and in rare occasions international dispute settlement systems) end up being the last resort. However, this demonstrates and characterises how cyberspace is predominantly

[11] The Chinese and Russian proposals during the 2012 conference were only reminiscent of earlier calls for increasing national and intergovernmental control over the Internet proposed very early in the life of the WSIS process. For a recent reflection on the resistance to the dominant models of Internet governance, see A. Bhuiyan, *Internet Governance and the Global South*. New York: Palgrave Macmillan, 2014: 51-72.

understood by international law, an understanding which resonates in both recent proposals and scholarly engagements.

A turn to direct intergovernmentalism for regulation of the Internet by the developing world (as proposed during the WSIS process) is often characterised as a move to legitimately bring the Internet within a system which ultimately functions by consent of territorial states and their governments. If multistakeholder governance, as a way of achieving more inclusive norm making, reflecting the multiplicity of actors and stakeholders involved in the Internet, is still characterised by *logos,* the move to intergovernmental governance only exacerbates the spatial detachments and legal fixities which characterise the concept of *logos*. Governments are only one amongst many entities using and experiencing the borderless space of the Internet, and by bringing the governance of the Internet under the umbrella of intergovernmental organisations like the UN, laws' authority is only further detached from the actors, communities and spaces, which become further objectified in the eyes of law. The spatial framework through which governmental and intergovernmental law largely operates, is based on principles of exclusive national (territorial) jurisdiction, which is at best questionable spatial criteria when dealing with cyberspace.[12] The inevitable territoriality of intergovernmental law making renders the user's social experiences, interactions and communications largely a matter of local or national concern and hence makes it absent from the analytical/operational framework of law. As described by Zoe Pearson, "international legal regulation seeks to provide 'accurate', orderly and rational process and interpretation of the world, but in doing so draws artificially simple disciplinary and conceptual borders around a more complex reality."[13] This is precisely what *logos* entails,

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[12] See generally the exceptionalist v. non-exceptionalist debate, Chapter 2, notes 2-5 and the accompanying text. More specifically regarding international law, see for instance, H. H. Jr. Perritt, "The Internet is Changing International Law." *Chicago-Kent Law Review* 73 (1998): 997-1054.

[13] Z. Pearson, "Spaces of International Law." *Griffith Law Review* 17, no. 2 (2008): 489-514: 493.

and it is because of the "more complex reality" that a different (read complimentary) conception of law, space and society is required. *Nomos* provides that alternative.

At times, the existence of Internet content and the difficulties of regulating it lead scholars to make room for an idea of cyberspace as a separate space. International law scholarship, from the early days of the Internet until now, fits a direct or indirect reliance on real space categories (through spatial analogies) when treating cyberspace. In *Cyber-Nations* by Ruth Wedgwood, we observe an early example of dealing with cyberspace from an international law perspective in which examples of "cyber-countries" and the web-presence of supposedly non-territorial communities are used to challenge the territorial underpinning of the international imaginary. Even though her analysis highlights the importance of "political enterprise" for nation-hood, "nation" is still an imagined category, which even though is not directly associated with territoriality, still has a condition of boundedness at its heart.[14]

A more recent example of the presence of cyberspace in international legal literature is the emergence of Andrew Murray's "*Uses and Abuses of Cyberspace*" as an official topic of engagement under a sub-section called "Other Global Problem Badly in Need of Substantive Legal Regulation".[15] In this analysis, Murray insists on the realisation of the spatial difference and separation of space (defined as "the lawyer's natural [physical]

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[14] Benedict Anderson, in *Imagined Communities,* boldly expresses the idea that "the nation is imagined as *limited* because even the largest of them [...] has finite, if elastic, boundaries, beyond which lie other nations. No nation imagines itself conterminous with mankind." See B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* [hereinafter *"Imagined Communities"*]. London: Verso, 1991: 7. Ruth Wedgwood also makes use of Anderson's theory in the context of cyberspace, by stating that "territorial boundaries may extend beyond the limits of a community's self conception." R. Wedgwood, "Cyber-Nations." *Kentucky Law Journal* 88 (2000): 965. Nevertheless, the problem exists with the requirement of "extension" of a boundary. This only confirms the "atavistic" nature of traditional geographic imagination in a discipline such as international law.

[15] I am referring to "*Realizing Utopia"*, edited by the late Antonio Cassese and specifically Andrew Murray's reflections on the relation between international law and cyberspace. See A. Murray, "Uses and Abuses of Cyberspace: Coming to Grips with the Present Dangers [hereinafter "Uses and Abuses"]." In *Realizing Utopia: The Future of International Law*, edited by Antonio Cassese, 496-507. Oxford: Oxford University Press, 2012.

environment") and cyberspace (defined as "the global network of interdependent information technology infrastructures, telecommunications networks, and computer processing systems").[16] However valuable it is to finally have a conversation on cyberspace and spatiality in critical international law scholarship, Murray's idea of "differentness" does not go beyond the categories of space associated with *logos* since he firmly remains in the vernacular of regulation and the creation of "de facto jurisdiction for cyberspace content."[17] Seen through the current international legal mechanisms and discussions, if the concept of cyberspace is used, what is meant seems to be Internet (infrastructure and Code) plus content. In this framework, users and their social experiences exist within the territorial setting of the state, and cyberspace is either explicitly or implicitly reduced to mean the Internet and its infrastructure, again located within the physical/real world that law detaches itself (through *logos*) for the purpose of regulation.

Therefore, by equating cyberspace to the Internet, and treating it as merely a new technology used by users, international law reduces its relation to cyberspace to a relation characterised by *logos* (positioning itself in a largely regulatory relation fixed within a territorial spatial frame).[18] As far as direct regulation goes, *logos* (being firmly based within the formalistic framework of positivism), seeks to provide certainty and predictability. In fact, as I have also mentioned elsewhere, the regulation of content and infrastructure is and has been part of the reality of the Internet especially since its expansion in the 1990s. However, describing cyberspace in the framework of *logos* (usually as the Internet), fails to capitalise on cyberspace as a socio-spatial

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[16] A. Murray, "Uses and Abuses." *Ibid.,* at 496. Murray argues that "*international cooperation* and perhaps even formalization of law through *treaty obligation* are likely to be successful" [Emphasis added] in the areas of e-commerce (UNCITRAL Model Law on Electronic Commerce), intellectual property rights (through WIPO treaties and other similar agreements), and criminal law (through the Council of Europe Convention on Cybercrime).

[17] A. Murray, "Uses and Abuses." *Ibid.,* at 506.

[18] See the discussion of positivism and *logos* in section 3.2.

phenomena/concept challenging the fundamental categories and assumptions of international law, in particular regarding the question of what constitutes the "international". *Logos* comes at the price of externalising law from its socio-spatial context. In order to perform this critical self-reflection on international law, I propose re-describing cyberspace using *nomos* as a mode of analysis, which allows us access to cyberspace as a space which is neither physical, nor imaginary, but experienced, lived and co-produced. Seen through *nomos,* cyberspace (as opposed to the Internet) has unique spatial characteristics which are absent from the account of *logos*. It is important to articulate this space if I want to use cyberspace in my critique of international law itself. As I will argue in the following chapter, *logos* does not just affect predominant international legal engagements with cyberspace, but characterises the way in which the "international" as a fundamental concept is widely perceived.

## 4.3. Re-Describing Cyberspace as Co-Produced Space

*Space is more than distance. It is the sphere of open ended configurations within multiplicities.*

*D. Massey*

In this section, I expand on the spatio-legal characteristics of cyberspace seen through the lens of the spatial heroes of *nomos*. What the combination of these scholars provides me with is a spatio-legal framework through which one can understand and make sense of the spatiality of cyberspace, so that it is not seen as an empty and detached container filled with content to be dealt with legally. In other words, through *nomos* cyberspace becomes more than the Internet and its "content"; not a space which is just "visited" by (international) law to be regulated. Through a post-disciplinary approach I argue for a spatial understanding which looks at the multiplicity of participants/users, and the

performativities they are involved in as part of a co-produced socio-spatiality which is located in the material/discursive realm of socio-legal multiplicity. My intention here is to encapsulate this realm and the modalities of co-production of space/law/society through the conception of law as *nomos*.

There is a wide consensus amongst legal geographers that "law helps to create place, to give it meaning."[19] Law (in the form of Code) is a key element in the production of space and place (cyberspace). Therefore as initially theorised by Lessig, law (understood both in terms of Code, but also more broadly) has a fundamental role in the creation of cyberspace and setting its "boundaries" of possibility.[20] However, having the critical (legal) geography literature (most importantly Delaney) in mind, we can see why this perspective might be deemed at best incomplete, since it places law and space in a one directional, yet still detached relationship. In the case of cyberspace, in addition to law, Code and the physical infrastructure, the users and their cognitive/social experience play a vital role in its socio-spatial production. Their sociality is constantly being made and remade through their socio-spatial experiences. According to Julie E. Cohen "[cyberspace] is produced by users, and not (in most cases) as a deliberate political project, but in the course of going about their lives."[21] This is an important observation since it puts human (social) experience at the forefront of spatial production. In other words cyberspace is not a space until we (socially) experience and live it as one. Without social experience and interactions, infrastructure, Code and software will not make a meaningful spatial entity. In the following sub-sections, I will look at cyberspace

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[19] A. Sarat, Lawrence Douglas, and Martha Merrill Umphrey. "Where (or What) Is the Place of Law? An Introduction." In *The Place of Law*, edited by Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey. Michigan: The University of Michigan Press, 2003: 15

[20] See generally, L. Lessig, *Code and Other Laws of Cyberspace.* New York: Basic Books, 1999.

[21] J. E. Cohen, "Cyberpace as/and Space." *Columbia Law Review* 107, no. 1 (January 2007): 218. For further development of this perspective, see J. E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* [hereinafter *"Networked Self"*]. New Haven: Yale University Press, 2012.

through the theoretical framework of Delaney, Foucault and Massey, to re-describe cyberspace through *nomos*.

### *4.3.1. Delaney and Performativity*

When Delaney points to a strategy of moving beyond the impasse of law and geography, we are required to theoretically and practically "rotate" space and law as two concepts in order to accommodate for their intrinsic performativity and materiality.[22] As we observed above, his argument is not regarding a specific type of space and is indeed applicable to the category of "space" in general. As observed by Delaney (social) spaces are produced, not just as a consequence of social relations, but in the way that the spaces are themselves performed. This performativity is seen in every corner of cyberspace. Every time a user enters a website with "terms and conditions", she is performing the legal by adhering to and at times breaking it. This is also the case for any form of national and at times international (inter-governmental) law that applies to the operations of users online. This performativity is not just on a website-specific level. Given the conditioning nature of Code as law, the performativity of the legal is built into the very fabric of cyberspace. Our experience is produced by and produces the socio-legal space that cyberspace is.

If Delaney is looking for a conception of law which sees "the legal [as] always *happening"* and performed by "*everyone* who acts in accordance with (or with transgressive reference to) understanding of rules, authority, rights, permissions, prohibitions, duties and so on", then that *is* cyberspace. Everyone who experiences cyberspace is also performing both space and law. Cyberspace *is* a materialisation of the performativity of both space and law. It is with this performativity that law starts moving beyond the physical notion of "the material", beyond object and objectivity, towards encompassing culture,

[22] For Delaney's idea of "rotation" of the material, the legal and the spatial, see discussion in section 3.3.2.

language, memory, etc. It is this alternate materiality which is constructed through the production of cyberspace as a co-constituted space with non-territorial socio-spatiality.

The analysis offered by George Landow who looks at the concept of "Hypertext" introduced by Theodor H. Nelson in the 1960s, will help demonstrate my understanding of the fluid and performative structure of cyberspace. According to Nelson *hypertext* means "*nonsequential writing* – text that branches and allows choices to the reader."[23] This definition does not concern itself with the content and the semantics involved with the text. It describes the settings in which a form consisting of words can embody fluidity and movement within its assumed structure. As Landow explains:

> [r]eaders move though a web or network of texts, they continually shift the center – and hence the focus or organizing principle – of their investigation and experience. Hypertext, in other words, provides an infinitely re-centerable system whose provisional point of focus depends upon the reader, who becomes a truly active reader in yet another sense.[24]

The resulting fluidity allows for a countless number of shifts from a few web-pages. Through the use of hypertext the reader is allowed to navigate the many conditions of possibility in front of her and to experience cyberspace. Hypertext, made available through the WWW, makes it possible to imagine the "performativity" of cyberspace more easily. By this I mean that the use of hypertexts is one way through which cyberspace is constantly explored and its "dimensions" are performed. For example, when we read a news article online, many of the words are "hyperlinks", the clicking of which will take us to another website, most probably with further hyperlinks, potentially exposing us to countless comments and discussions on a range of subjects. The comments of users and the use of hyperlinks are examples of performative action, possibly expanding the socio-spatial experience of all users, consequently affecting the

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[23] Theodor Nelson quoted by G. Landow, "Hypertext and Critical Theory." In *Reading Digital Culture*, edited by David Trend, 98-108. Oxford: Blackwell Publishers Ltd, 2001: 100.
[24] G. Landow, "Hypertext and Critical Theory." In *Reading Digital Culture*, edited by David Trend. Oxford: Blackwell Publishers Ltd, 2001: 105.

very spatiality of cyberspace. It is through "moving through" images from one "place" to another that the user, mediated through her cognition, experiences cyberspace as a space with sociality enabled and co-constituted through its very design.[25]

Central to the idea of a performative theory of cyberspace is also the ways in which the identity, habits and the interests of the user(s) are affected and shaped by this performed fluidity. Our changing habits of communication,[26] academic research and debate,[27] and more generally the networking logic, "substantially modifies the operation and outcomes in processes of production, experience, power, and culture."[28] These performative processes of co-constitution of spaces of our day to day sociality are central to my understanding of the intricate relation between law, space and society encapsulated by the concept of *nomos*.

### *4.3.2. Foucault and the Alternate Ordering of Heterotopia*

Foucault's heterotopia as a space of "alternate ordering" is often a spatial concept of choice when dealing with cyberspace and plays a significant role in my re-description of

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[25] Of course this experience is not limited to text. Hyperlinks within the WWW connect users to all forms of media such as video, audio, live interactive forums, and images.

[26] The effects of networked communications through cyberspace on our everyday lives are plentiful and beyond doubt. For instance, the increasing availability of smart phones have allowed simultaneous Internet access, text communication and phone use.

[27] There is a growing trend amongst academics to engage in running conversation through specialised blogs and websites. Often, the discussions in these forums are less formal than journal articles and this informality results in a wide range of topics being discussed. In addition, due to the informal character of the websites, scholars young and old can engage in conversations and exchanges that are also available to other to see and respond to. For instance EJIL talk!, http://www.ejiltalk.org/ (accessed September 12, 2014) *or* ASIL blogs, http://www.asil.org/blogs (accessed September 12, 2014) are examples from the field of international law. These forums also often have a presence on social networking websites such as twitter, notifying their followers of new contributions to the blogs. This is particularly important since it allows the links to the contributions to circulate in the non-academic realm of Twitter (or any other website), hence possibly exposing such conversations and exchanges to people who are often excluded from the academic discussions.

[28] M. Castells, *The Rise of the Network Society: The Information Age: Economy, Society, and Culture Volume I*. London: Blackwell Publishing Ltd., 2010: 500.

cyberspace through the spatio-legal framework of *nomos*.[29] The spatiality of cyberspace belongs in the first place to the "real" existence of the users experiencing cyberspace through their connection to the Internet. However, one question still remains: what is "alternate" about the ordering of the "there" of cyberspace which qualifies it as a heterotopian space? An example will make things clearer. When a typical citizen (regardless of the locality of connection) experiences cyberspace, what she observes is unique to say the least. The possibility of "face-to-face" conversations (through services such as Skype) with different users in different "locales", outside the spatial bounds of possibility in a "real" physical sense is not any more a utopian vision; it is indeed an actuality which arguably creates an alternate ordering in a non-territorial fashion. In addition, one can point to a news website as a heterotopia since readers are allowed to interact with one another debating and discussing the topic "*inside"* the comments section of the webpage in question.[30] This is also the case in the case of services, such as Tumblr, which place the user within a fluid interactive web of texts, images and videos. This is an "alternate ordering" since such a discursive space allows for a non-localised (in terms of real world experience) sociality to occur, creating social experiences and cultural/ethical orderings otherwise not possible.

Cyberspace often challenges many accepted categories of the social, private/public, home/work, domestic/international, etc. A range of theorists have looked at the effects

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[29] Examples where cyberspace is analysed through the lens of heterotopias include Diana Saco's *Cybering Democracy*, and Julie E. Cohen's "Cyberspace as/and Space." In her analysis of the heterotopian perspective in cyberspatial analysis, Cohen interestingly singles out Lessig's theory of "Code" as an influential approach in which cyberspace is treated as a space which enables (not in an essentialist way) certain forms of alternate ordering. (at 222) It is these alternative potentials that drew the attention of many utopian thinkers towards cyberspace, with the only difference that the material situatedness of cyberspace was largely ignored by the latter. See generally J. E. Cohen, "Cyberpace as/and Space." *Supra* note 21. See also D. Saco, *Cybering Democracy: Public Space and the Internet* [hereinafter "*Cybering Democracy*"]. London: University of Minnesota Press, 2002.

[30] I should qualify here that not all news web pages have a comments section. However the point I am raising here is not to generalise the experience of "alternate orderings" to all Internet use, but to highlight the possibility and an example of such ordering happening in a now well established "comment section" of many news websites.

of cyberspace and more generally digital technologies on subjectivity, specifically in the way that they "enable new forms of subjectivity."[31] Because of the rootedness of cyberspace in the physical existence of its users, this in effect will challenge many accepted forms of sociality and common-ground surrounding the subject and hence affect forms of spatiality produced through the discursive apparatuses of the social. According to Julie E. Cohen "the 'cyberspace' metaphor expresses an experienced spatiality mediated by embodied human cognition."[32] The emphasis on the "body" relates the social experiences of users with "real space" (the physical) while acknowledging the social and legal production of cyberspace. What I am suggesting here is that heterotopias have a somewhat negotiated "in-between-ness" about them which resonates well with the spatiality of cyberspace.[33] Cyberspace too, as a networked space of billions of users and access points, is neither purely real nor completely metaphoric/utopian/imaginary. It is this condition that makes "alternate orderings" a possibility and a "reality" beyond the physical and conceptual boundaries of everyday life.

Therefore, unlike the binaristic spatial image of cyberspace adopted and promoted by law as *logos,* the theory of heterotopias provides another step in my critique of the spatial presuppositions of (international) law with regards to cyberspace. In the words of Cohen, heterotopian theories of cyberspace are "promising vehicles for exploring both the social construction of cyberspace and the spatiality of cyberspace as experienced by its users."[34] One notable example of heterotopian thinking with regards to cyberspace is

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[31] D. Savat, *Uncoding the Digital: Technology, Subjectivity and Action in the Control Society.* London: Palgrave Macmillan , 2013: 6. See also, J. E. Cohen, *Networked Self. Supra* note 21.
[32] J. E. Cohen, "Cyberpace as/and Space." *Supra* note 21, at 226.
[33] Hetherington refers to heterotopia as a "space-between." K. Hetherington, *The Badlands of Modernity: Heterotopia and Social Ordering.* London: Routledge, 1997: ix. This is described further by Saco as "where processes of ordering reveal themselves as such by juxtaposing different spatial orders." D. Saco, *Cybering Democracy. Supra* note 29, at 20.
[34] J. E. Cohen, "Cyberpace as/and Space." *Supra* note 21, at 221-222.

Lessig's theory of Code as law. As we observed above, even though he took a widely exceptionalist approach to cyberspace,[35] his theory is clearly distinguishable from scholars who imagine cyberspace as a detached, even utopian, space. This is in the way that he saw cyberspace as a sight which is conditioned by Code, in a way that enables (and limits) the range of "alternate orderings" (for example the criticised utopian dreams of libertarian freedoms). In his own words, "cyberspace is a place. People live there. They experience all the *sort of things* that they experience in *real space* there."[36] The centrality of people's experiences in constructing the *lived* character of cyberspace as a space of "alternate orderings", contrasts it from both the utopian and the "real space" theories.

### *4.3.3. Massey and Multiplicity*

As discussed in the previous chapter, Massey's theory of space plays a central role in the construction of the concept of *nomos* and it is inevitably central to my re-description of cyberspace. For Massey, space is not only the "product of interrelations [and interactions]" but it also "must be predicated upon the existence of plurality. Multiplicity and space are *co-constitutive*."[37] In this regard, she builds on social and political discourses that embrace "heterogeneity" and "difference" instead of universal narratives and argues that simultaneous existence of difference is not only historical but also essentially spatial.[38] She compliments this proposition by stating that "space is always under construction."[39] The spatio-temporal plurality that Massey builds into the very concept of space is key for a re-description of cyberspace through *nomos*. Unlike the image of cyberspace presented through predominant (international) legal

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[35] See chapter 2, note 4 and the accompanying text.
[36] L. Lessig, *Code and Other Laws of Cyberspace. Supra* note 20, at 190. [First emphasis added] See also L. Lessig, "The Zones of Cyberspace." *Stanford Law Review* 48, no. 5 (1996): 1403-1411.
[37] D. Massey, *For Space*. London: Sage Publications Ltd, 2005: 9.
[38] *Ibid.,* at 10.
[39] *Ibid*., at 9.

approaches to cyberspace, the material and inter-relational aspect of space does not allow one to describe it as a container of information (data) through "real" space metaphors or simply as the physical and infrastructural space of the Internet, but rather a continuous co-constitution that only becomes a space through material and discursive interactions. Moreover for Massey, this co-constitution happens simultaneously at a spatial level, and at the level of identities and subjectivities. Therefore, in line with a range of contemporary critical geographers (including Delaney), there is no detachment between the spatial and the social. Seen through this lens, the spatiality of cyberspace becomes one with the social interactions which continuously construct it as a space of multiplicity of users, communications and inter-relations.[40]

Massey also offers a series of direct spatial reflections on cyberspace.[41] She looks at cyberspace in the context of what she calls the "annihilation" of space by time. According to Massey, there is a widely held view in the contemporary era that due to "more and more 'spatial' connections, [...] there is more 'space in our lives"', yet, since it takes virtually no time to connect, and physical distance (generally seen as a precondition to traditional perspective on space) does not play a role in our connections, space per se has been annihilated by time. Massey challenges this view strongly by disassociating space from (material) distance, while highlighting the limitations of utopian thinking about cyberspace by emphasising the "significance of materiality (as opposed to virtuality)."[42] This disassociation is significant since Massey's conception of cyberspace, similar to Foucauldian heterotopias, has a quality of "in-betweenness" configured within multiplicities. It is this quality that leads her to ask a question which accurately describes the central problematic of my proposed legal

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[40] P. G. T. Healey, *et al.*, "Communication Spaces." *Computer Supported Cooperative Work* 17, no. 2 (2008): 169-193.
[41] Massey looks at cyberspace in the context of the space/time binary.
[42] D. Massey, *For Space*. *Supra* note 37, at 94.

engagement with cyberspace. According to her, the right question to ask with cyberspace (and more generally by "communications revolution") is "what kinds of multiplicities (patternings of uniqueness) and relations will be co-constructed with these new kinds of spatial configurations."[43] The wider sensibility of my project stems from a similar position, and it is towards the co-constitution of and engagement with different spatial configuration that I wish to turn the attention of international law.

One of the places where the production and evolution of cyberspace through users' experience and interactions is most clear is in the virtual spaces/worlds that are instantiated in Massively Multiplayer Online Games (MMOGs). Even though for their existence, material conditions are required, and most virtual worlds have endless analogies to material/physical demarcations, the spaces are being constantly constituted through the (inter)actions, and experiences of the users. As prominent theorists of virtual worlds put it:

> [v]irtual worlds are unreal. We mean by this that they are artificial, fictitious, imaginary, intangible, and invented – one can find these synonymous for "unreal" in a standard thesaurus. Yet virtual worlds are real as well. All things artificial or invented do not fall entirely outside the ambit of reality.[44]

Manners of human action continue being represented and reproduced through the building and negotiation of this "new" world. Therefore cyberspace becomes no longer material but not completely immaterial either. It is often experienced as very real indeed! This is because neither materiality nor abstraction constitute cyberspace as a space but rather the lived experiences and interaction of the users in their plurality does.

This perspective towards cyberspace, on the one hand confirms its "distinctive" spatiality, while at the same time situating it in our day to day lives, affecting our social

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[43] *Ibid.,* at 91.

[44] F. G. Lastowka and D. Hunter, "The Laws of the Virtual Worlds." *California Law Review* 92, no. 1 (2004): 7.

interactions (whether positively or negatively), and most importantly, embracing a sort of multiplicity which goes beyond the territorial and conceptual boundaries of not only nation-states, but also from categories such as local, public/private, home and family.

### *4.3.4. Cyberspace and Nomos*

Within the analytical framework of *nomos,* cyberspace is not just a space which is produced through law and social interaction once and for all. It is not a space which can then be objectified and looked at from the outside. Neither is it a space which has an inside in which communications occur.[45] It is lived, constantly experienced, and re-imagined. It is true, as Lessig has pointed out time and again, that cyberspace (and the Internet) and the possibilities of freedom and interaction all depend on the infrastructure and Code, and this is by no means a natural condition; it is prone to fundamental changes.[46] However, as demonstrated above, it is not the infrastructure and Code which make cyberspace essentially a space; it is the human actions and interactions, socialised and spatialised through human experience (collective and individual) that make it a space. Therefore, the significance of re-describing and re-imagining the spatiality of cyberspace, from a "container" of content to a co-produced, non-territorial, socio-spatiality, cannot be overstated.

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[45] For instance, observations such as "all communication between two or more parties done through a computer interface is performed in cyberspace" (Toni Sant), do not fall into the description of cyberspace through *nomos,* since it still relies on an inside/outside distinction which falls back on the use of real space analogies common with *logos.* See T. Sant, *What is "Performative" About Cyberspace?* October 1996. https://files.nyu.edu/as245/public/writings/cyberspace/leonardo/question.html (accessed August 20, 2014).

[46] At the time writing, I am aware of the possible changes to the nature and infrastructure of the Internet, due to the recent revelations surrounding the role of the US and some European governments in widespread global surveillance of citizens. For an analysis of the role of the National Security Agency revelation and the dangers they possibly pose to the future of the Internet, see J. Naughton, "Edward Snowden's Not the Story. The Fate of the Internet Is." *The Guardian.* 28 July 2013. http://www.theguardian.com/technology/2013/jul/28/edward-snowden-death-of-internet (accessed August 18, 2014). Another importnat scholar whose warning regarding the nature of the internet and the illusion of freedom and privacy associated with Internet use is Evgeny Morozov. See for instance E. Morozov, *The Net Delusion: The Dark Side of Internet Freedom.* Public Affairs, 2011.

The triparate co-production of space, law and society is central to thinking legally about cyberspace. Cyberspace is neither purely produced (either legally or socially) nor simply a space of the materiality of "things". The three theorists discussed demonstrate the fundamental and simultaneous situatedness of cyberspace within the materiality of everyday social interactions; through our connection to the infrastructure of the Internet but not gaining its spatiality solely from that infrastructure.

Cyberspace is produced by and produces human/social experiences which are essentially spatial. It is this social experience which gives a technological phenomenon like the Internet a heterogeneous spatial character. As observed by Julie E. Cohen "cyberspace does not pre-exist its users."[47] As a "communication space", it is qualitatively and quantitatively constituted through the interaction of its users and human practice.[48] Cyberspace is a space which has a living sociality at its heart.

However, the most important characteristic of cyberspace is that, since it is a space of multiplicities, neither purely material nor discursive, the sociality that is co-constituted is non-territorial and non-local. No longer is social experience and interaction limited by proximity and distance. Cyberspace has changed the nature of our social experiences and has expanded them beyond territorial and conceptual closure; a sociality which is understood in terms of the inter-relationality of a multiplicity of components (material, discursive, spatial). Communication through networks, which are not necessarily anymore bound by physical space, has arguably expanded our everyday social

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[47] J. E. Cohen, "Cyberpace as/and Space." *Supra* note 21, at 218.

[48] In explaining the spatiality of cyberspace, it is also useful to take note of the ways the *constitution* of cyberspace has been theorised in other disciplines. The analysis done by Healey *et al.* shows that even the concept of "place" is not sufficient to determine the patterns of closeness and mutual involvement observed in an online community. To account for this, Healey, et al. argue that you need a concept of "communication space" as distinct from both space and place. See generally, P. G. T. Healey, *et al.*, "Communication Spaces." *Computer Supported Cooperative Work* 17, no. 2 (2008): 169-193.

experiences, and hence the material and discursive fabric of our everyday life.[49] As Edward T. Hall's theory in *Proxemics* suggests, "individuals are surrounded by a bubble of personal space the size of which varies according to social relationship and setting."[50] In other words, lived space is constituted partly by "the setting", which can include physical limitations of the body, and partly by the social interactions (verbal and non-verbal).

With the advent of cyberspace, and given the theoretical analysis above, the direct connection between the local setting and the social relationships becomes marginal and the "bubble" grows (for example every time a hyperlink is used to connect to a forum, discussion page or social networking website or one receives a comment on a Twitter post). Thus, social relations are no longer completely limited by "the [physical] setting" which is imagined as spatially bound. In other words, cyberspace has significantly expanded our ability to communicate on a multiparty level between people and across socialities, on a non-territorial basis. This allows us presence in socialities while being physically absent from them. This presence and engagement is not territorial and its spatiality is only validated through the very experience of communication with/through a multiplicity; it has enabled a "space as always under construction", but on a non-territorial basis.

The shift to *nomos* in our description of cyberspace resonates with the fictional definition offered by William Gibson who initially created the term. He refers to cyberspace as a "consensual hallucination experienced daily by billions of legitimate operators, in every nation [...] Unthinkable complexity. Lines of light ranged in the

[49] When I speak of "expansion" I am not referring to it in terms of physical proximity and boundaries, but rather a social expansion through the increased multiplicity of interactions (social and spatial).

[50] Hall's theory presented by Low and Lawrence Zúñiga. See S. M. Low and Denise Lawrence-Zúñiga. *The Anthropology of Space and Place: Locating Culture.* Oxford: Blackwell Publishers Ltd., 2003: 49.

nonspace of the mind […].”[51] The simultaneous reliance on the “operator”, its location (nation), and the consensual space of the mind, characterises the form of in-betweenness, which is central to the conceptualisation of space in *nomos.* As observed by Saco, “in fact, the term *cyberspace* evokes a stronger, ontological claim that networking really *is* a kind of space, even if it is (almost) entirely a ‘consensual hallucination’.”[52] Inside this statement, there is an important element which seems to be shared with the notions of spatiality proposed by Foucault, Massey and Delaney. This “hallucination” is produced through a form of negotiated “consent” amongst the elements of this network (social, material, and of course legal). They are producers of this consent at the same time as they are themselves “networked”.[53] This is where the sociality of cyberspace plays a decisive role both in its own production and the co-constitution of the “hallucinating” user and her socio-spatial experiences.

## 4.4. The Possibilities of *Nomos*: Beyond Detached Regulation

Building on the argument that the physical infrastructure and Code of the Internet could only be seen as cyberspace if we consider socio-spatial processes of co-production captured by *nomos*, in this section I would like to comment on the analytical possibilities and challenges this argument might provide for international law. I seek to highlight the non-territorial socio-spatiality of cyberspace and having this spatiality in mind reflect on the wider socio-spatial fabric of international law. Given the characteristics of *nomos,* I point to this shift in mode of analysis (from *logos* to *nomos*) while acknowledging the importance and necessity of regulatory endeavours. In other words, my argument regarding the limits and predominance of *logos* with regards to cyberspace, does not lead to the dismissal of regulation altogether (as some cyber-

[51] W. Gibson, *Neuromaner*. London: Harper Collins Publishers, 1995: 67.
[52] D. Saco, *Cybering Democracy, Supra* note 29, at xxv
[53] See generally J. E. Cohen, “Networked Self.” *Supra* note 21.

libertarians might argue), since such a position would be unrealistic and arguably utopian given the multiple layers of law regulating the Internet and cyberspace. Neither do I seek to contribute the all important question of how (or how not) to regulate/govern the Internet and cyberspace. Instead my object of critique is the socio-spatiality of international law.

As demonstrated above, cyberspace is co-produced through our daily experiences and interactions through the Internet, in a way that our ways of life are also fundamentally transformed. Some international lawyers, ranging from feminists to critical/TWAIL scholars have shown interest in paying attention to everyday life processes and spaces.[54]

If cyberspace is understood within the social, spatial and legal framework of *nomos,* then international law can also be located in a co-producing relationship with the fluidity and situatedness of human relations. It is through *nomos* that (international) law can access the Internet *as* cyberspace; a space not understood through analogies of territory and land, or reduced to territorial notions of socio-spatiality (*logos*), but one which is co-produced through a multiplicity of social interactions and socio-spatial experiences. This space is essentially non-territorial and social, even if the physical infrastructure (computers, wires, nodes) and users are located in a territorial setting.[55] Within the conceptual/analytical framework of *nomos,* space is co-constituted both by the material and the discursive, so that its socio-spatiality includes, yet goes beyond, the territorial/mental binary of *logos*. Through *nomos,* space is an in-between (of materiality and abstraction) made of sociality, materiality and discursivity (including the regulation oriented approached to the legal). It has neither an inside nor an outside, yet experienced as a space; a socio-legally fluid one for that.

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[54] See chapter 1, note 11 and the accompanying text.

[55] I understand that cyberspace is not always experienced as a non-territorial spatiality. However at instances that it is experienced as one, international law needs to develop a conceptual toolbox to access these forms of sociality.

As pointed out through the analysis of *nomos* in the previous chapter, the social, the spatial and the legal are not distinct realms, which then affect (even produce) each other in different ways; they are co-produced. This matters for my attempt to imagine and access the socio-spatiality of the non-territorial "international", since the separation of the three categories does not allow us to imagine one as fluid, without keeping the other as neutral and exogenous. If they are imagined as co-produced, then this makes it possible for us to re-think our notions of sociality according to the types of space and legality that are experienced and co-produced through that sociality itself. In the same way, our understandings of space can then be re-thought according to the socio-legal relations and interactions that are experienced and co-produced through that fluid spatiality.

Cyberspace is important for international law, because we have never experienced a space which allows the formations of communities and interactions beyond the physical (spatial) and temporal limitations to the extent that we observe in cyberspace. Never has our everyday experiences of sociality gone beyond our immediate physical limits and boundaries to such an extent.[56] Given that within the framework of *nomos,* the social, the legal and the spatial are non-separable and co-produced, one could deduce that with the expansion of the socio-spatial experience beyond the territorial, the legal also becomes, at least partly, experienced non-territorially. This for instance, is the case for cyberspace, because with the non-territorial extension of our socio-spatial relations, non-territorial forms of legality (e.g. Code) becomes woven (in a co-productive manner) into our experiences of sociality and space. Given that traditionally the broad field of

[56] Of course, there are many who argue that our social relations had extended beyond national or local borders long before the advent of the Internet, with the availability of telegraph, telephone, etc. Even though "relations" (often one to one) have existed for a long time, it is the extent and the decentred form of this always fluid sociality that is a special characteristic of cyberspace. This is in addition to the availability of different forms of communication (video, audio and text) in a simultaneous multi-party format.

international law considers socio-legal relations outside the "national" through the "international", then the expansion of sociality beyond the local and the national is bound to provide a challenge to the way international lawyers predominantly understand the "international". Therefore, Diana Saco is right in arguing that given the impact of the Internet on a wide range of practices (social, economic, political, personal, cultural, etc.), "what is needed is not just any socio-spatial theory of cyberspace, but one, more specifically, that can address the relationship between spatiality and social change."[57] I argue that, by recognizing the creative force of the socio-spatial collective as a vital element in the formation of the normative universe, *nomos* does exactly that.

As it is highlighted in chapter one, the socio-spatial fabric of international law has always been a central aspect of different theories and approaches of international law, whether it is positivism, instrumentalism, or even New Stream scholarship.[58] The sociality of international law is especially important, since it is from the (consent of) legal subjects (mainly states, but also "non-state" actors) and collectivities (international institutions and organisations), situated within a perceived space that (non-natural) international law maintains its legal character.[59] If I seek to further my critique of international law's socio-spatiality by using cyberspace as a means of intervention, an important step is needed and that is demonstrating how the spatial, social and legal fabric of international law are predominantly conceptualised. As Andreas Philapopulous-Michalopolous shows, in the wake of the "spatial turn in law", certain

[57] D. Saco, *Cybering Democracy, Supra* note 29, at 9.
[58] See sections 1.1 and 1.2.1.
[59] This is the characterisation of international law that formed after the famous critique of John Austin, claiming that international law is not law. For an analysis see A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law." *Harvard International Law Journal* 40, no. 1 (1999): 10-16.

fundamental concepts need to be fundamentally questioned and challenged.[60] He argues with respect to *justice* that "if the peculiar characteristics of space are to be taken into account, a concept of justice will have to be rethought" on a fundamental level.[61] Following a similar critical sensibility, and in line with many feminist scholars and recent spatial analysis of international law, I would like to present and challenge the fundamental concept and the most common socio-spatial referent of international law, the "international", using *logos* and *nomos* as my modes of analysis. In order to discuss non-territoriality in international law, the "international" is the most fundamental concept since it seeks to accommodate law and socio-political relations beyond the territorial boundaries of the nation state.

## 4.5. Conclusion

The arguments and descriptions of this chapter were intended for two separate purposes. On the one hand, I demonstrated that the discourse and practice of international law with regards to the Internet and cyberspace, fits quite well in the category of *logos*. Their understanding of cyberspace operates on the margins of the physical/mental distinction (often through preferring the Internet and "new technology" as their subject matter), and the legal is only seen through the lens of regulation. By objectivising the Internet, international law reduces social interactions and communications through the Internet (either day to day conversations or social movement activism and mobilisation) to content, imagining cyberspace as a container of data and information. Even though I am critical of this approach, my critique is not directed at the regulatory mechanisms, etc.

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[60] For a discussion of law's "spatial turn", see section 1.2.2. Also for a recent overview see I. Braverman, *et al.*, *The Expanding Spaces of Law: A Timely Legal Geography*. Stanford University Press, 2013.

[61] A. Philippopoulos-Mihalopoulos, "Law's Spatial Turn: Geography, Justice and a Certain Fear of Space." *Law, Culture and the Humanities* 7 (2011): 187-202.

In the second section of the chapter, I applied the framework of *nomos* to international law's understanding of cyberspace and re-described the latter according to the spatio-legal characteristics of *nomos*. Within this conceptual framework, the relation between cyberspace and the multiple socio-legal performativities that co-constitute the socio-spatiality of cyberspace became clear. Consequently, the non-territorial experiences of sociality made available through the experience of using the Internet, were no longer reduced to content. Instead, through the surfacing of this socio-spatiality, I highlighted the possibility of imagining another form of relationship between (international) law and cyberspace, a relationship were the socio-spatial experiences are fundamentally intertwined with the wider normative and legal frameworks present. In other words, this re-description departs, yet does not dissociate, from the professional and institutional paraphernalia of control attached to the Internet through *logos*, and imagines regulation as only a small element within the wider socio-spatial normative universe experienced through and co-produced by cyberspace.

This chapter therefore constructs the image (description) of cyberspace as an international yet non-territorial sociality, which I will use in the rest of my thesis to challenge the ways in which international law has so far predominantly conceptualised its own socio-spatial fabric, i.e. the "international". In the next chapter, I will provide an elaboration of the range of ways in which the "international" is understood in international law, pointing to important consistencies in the spatio-legal configurations of international sociality, a category which is crucial for all projects of international law.

# Chapter 5 – Tracing Logos: International Law and the "International"

*Law is always "worlded" in some way.*

*I. Braverman, et al.*

## 5.1. Introduction

So far, I have been referring to the socio-spatial fabric of international law as the "international". The aim of this chapter is to demonstrate and evaluate the relationship between the field of international law and the foundational concept of the "international". I explore the predominant understandings of the "international" within a discipline which all too often treats its own foundational categories and concepts as self-evident. Even though the self-evidence of the category of the "state" has been open to question in a range of forums, the category and understanding of the "international" has gone largely unquestioned at least in mainstream international legal analysis.[1] Reflection on the "international" is necessary since it, in multiple ways, carries the weight and scope of international law's dreams and possibilities.

In this chapter, through a descriptive/analytical approach, I evaluate the predominant understanding of the "international" in international law using the overall framework provided by the theoretical distinction between *logos* and *nomos*. The examination of the "international" in the tradition of international law is inspired by categories of spatial

[1] Matthew Craven, in his analysis of *Statehood, Self-Determination, and Recognition* suggests that "the place assumed by the "State" in international law is almost too self-evident." (at 205) See generally M. Craven, "Statehood, Self-Determination, and Recognition." In *International Law*, edited by Malcolm D. Evans, 203-251. Oxford: Oxford University Press, 2010. My position with regards to the "international" is similar to Craven's, in the sense that I take issue with the "almost *too* self-evident" character of "international" in international law.

imagining contributed by David Delaney.[2] These categories include imagining the "international" "as no more than the aggregate of 'national' sovereign domestic spaces,"; "as a global space that is 'over and above' or at least conceptually distinct from, the sum of domestic spaces,"; "as spatial referent" for the international community, humanitarian law, human rights, etc.; as "a collection of anomalous or interstitial spaces";[3] *or* as a "condition of possibility that pre-existed most, if not all, extant states."[4] It is no secret that territoriality plays a key role in the way international law perceives the socio-spatial ordering of the world. Starting from this premise, and combining it with Delaney's categories, I demonstrate the presence of a consistent territorial configuration within the different ways of perceiving the "international". Further, I will expand on the widely held view that the "international" has no concrete spatiality of its own, and is "spaceless".[5] I associate this view with Delaney's category of the "international" as "over and above". Through examining the spatio-legal frameworks of understanding the "international" within existing approaches to international law, I demonstrate the operation of *logos* as the dominant spatio-legal sensibility in international law.

This chapter proceeds in the following steps. First, I explore the dominant approach to the socio-spatiality of the "international" using Delaney's insightful categories. I then consider two important critiques of the dominant approaches to international law, articulated by Martti Koskenniemi and Sundhya Pahuja, to demonstrate that despite

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[2] I particularly focus on Delaney's categorisation of the "international" firstly because of the crucial role his theorisations of space, law and society play in the construction of *nomos* in this thesis.

[3] See D. Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* [hereinafter *"Nomospheric Investigations"*]. New York: Routledge, 2010: 61.

[4] *Ibid.*

[5] For arguments regarding the spacelessness of the "international" in international law see D. Buss, "Austerlitz and International Law: A Feminist Reading at the Boundaries." In *International Law: Modern Feminist Approaches*, edited by Doris Buss and Ambreena Manji, 87-104. Oxford: Hart Publishing, 2005. See also Z. Pearson, "Spaces of International Law." *Griffith Law Review* 17, no. 2 (2008): 489-514.

these critical challenges, their socio-spatial fabric still remains within the predominant characterisation derived through the application of Delaney's categorisation. I conclude the chapter by indicating the need for moving beyond *logos,* and applying the spatio-legal category of *nomos* for a re-conceptualisation of the relation between international law and the socio-spatiality of the "international". Given the dominance of *logos* in international legal accounts, this re-conceptualisation is necessary to overcome the conceptual limitations (separation of law/space/society and a mental/abstract spatial binary) that prevent international law from accessing and incorporating processes and instances of non-territorial socio-spatial experience within the critical projects;

## 5.2. The Territoriality of the "International"

Within the "tradition" of international law,[6] territoriality is the most dominant and long lasting spatial lens through which scholars and practitioners have seen the world and envisioned its ordering. One way of demonstrating this is to look through the historical development of international law and to locate this spatial sensibility in the so called Westphalian framework.[7] What can be observed through this so-called "origin" of (modern) international law is that it signals the existence of a European territorial system prior to the development of law. In other words, the dominant and much criticised Westphalian narrative positions the initial role of international law as (and arguably still does) to connect pre-existing territorial entities together while securing their lasting and peaceful existence as separate bodies.[8] As discussed by Stephane

[6] I am borrowing the term "tradition" from Matthew Craven. See M. Craven, "The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law." In *Constructing International Law: The Birth of a Discipline*, edited by Luigi Nuzzo and Milos Vec, 363-403. Frankfurt am Main: Klosterman, 2012.

[7] The Westphalian framework generally refers to the arrangements made in 1648, between European polities after the Thirty Year War, and is often referred to as a paradigm shift for modern day international law.

[8] For an elaboration of the Westphalian narrative of the "origin" of international law, see R. A. Falk, *A Study of Future Worlds*. New York: Free Press, 1975. For another critical reflection on the categorisation of the Westphalian Treaties as the origin of international law see M. Craven,

Beaulac in his analysis of *The Westphalian Legal Orthodoxy,* "[t]he twin congress then held [at Westphalia] is deemed the forum where *distinct separate polities* became sovereign, that is, enjoying absolute and exclusive control and power over a relatively *well-defined territory*."[9] Seen from this perspective, state sovereignty in its current sense, is something that comes after territory, as a *sine qua non* of international law imagined as an inter-relational legal system concerned with relations between pre-existing territorial entities.[10] Even though the term "international" was introduced in the nineteenth century by Jeremy Bentham, the Westphalian perspective strongly resembles the traditional description of international law as *jus inter gentes*, which harbours the idea of the "international" as *between* (territorially) distinct nations, with their sovereignty produced through this inter-relational approach to international law.[11]

The territoriality of international law is also apparent through the predominant understanding of the "international" during the period in which state territory came to be significant for international law and its actors not just to delimit their spaces from one another (i.e. within Europe) but to delimit a notion of "international" associated with European territory and civilisation. More precisely I am referring to the late

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"Introduction: International Law and Its Histories." In *Time, History and International Law*, edited by Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi. Leiden: Martinus Nijhoff Publishers, 2007: 8. See also G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*. Cambridge: Cambridge University Press, 2004.

[9] S. Beaulac, "The Westphalian Legal Orthodoxy - Myth or Reality?" *Journal of the History of International Law* 2 (2000): 148. [Emphasis added]

[10] This view also resembles what Martti Koskenniemi calls "ascending sovereignty," as an understanding of sovereignty which has its origins in the inter-relation between identifiable entities. For Koskenniemi's discussion of sovereignty and statehood see M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal* Argument (hereinafter *"From Apology to Utopia"*]. Cambridge: Cambridge University Press, 2005: 224-302.

[11] For a discussion of international law as *jus inter gentes* which was "a consequence of the clear demarcation of self-contained territories," see C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. New York: Telos Press , 2003: 129. This view strongly resembles Koskenniemi's theory of ascending sovereignty demonstrated as one of two dominant (and constantly oscillating) perspectives on statehood in international law. The second one is the descending perspective which I shall discuss in section 5.3.

nineteenth century and the co-solidification of international law and European colonialism of "non-European" territory.[12]

Even though the legal category of statehood was formalised in modern international law in the early twentieth century,[13] the legacy of the "spatial othering" of European colonialism in the crystallisation of territory as the most important spatial category predates the legal category of the state in international law.[14] During the late nineteenth century, most international lawyers clearly relied on territorial criteria of inclusion and exclusion in defining the theoretical and practical boundaries of international law.[15] Europe came to be seen as the central spatial unit for international law. International lawyers such as Westlake relied heavily on an essentially spatial (in terms of physical space) logic of inclusion and exclusion in defining the relationship between the European state(s) and the *region(s)* in which the natives resided.[16] The "international",

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[12] By co-solidification I am suggesting in line with a range of critical scholars of international law (mainly TWAIL) that modern international law and colonialism (and imperialism) developed simultaneously, co-producing each other. I am referring to theories that view the history of international law and the development of positivism and colonialism as happening simultaneously. See for instance A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law." *Harvard International Law Journal* 40, no. 1 (1999): 1-80. See also J. T. Gathii, "Impertialism, Colonialism, and International Law." *Bufalo Law Review* 54, no. 4 (2007): 1013-1066.

[13] Montevideo Convention on Rights and Duties of States [1933] 165 LNTS 19.

[14] Even though during 20th century, international lawyers have increasingly recognized the existence of a "spectrum" of sovereignty. Through the idea of "earned recognition," international layers are then able to describe entities that are "something less than a fully sovereign state, but more than a sub-state entity." (375) Even through in this formulation territory becomes less significant as a measure of recognition, the entities recognised are still seen as within the boundaries of fully sovereign territorial states, sustained by the dominant spatial logic of Montevideo. For an analysis see M. P. Scharf, "Earned Sovereignty: Juridical Underpinnings." *Denver Journal of International Law and Policy* 31, no. 3 (2003): 373-387.

[15] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* [hereinafter *"Gentle Civilizer"*]. Cambridge: Cambridge University Press, 2001: 98-178. See also M. Craven, "The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law." In *Constructing International Law: The Birth of a Discipline*, edited by Luigi Nuzzo and Milos Vec, 363-403. Frankfurt am Main: Klosterman, 2012.

[16] In his influential book *Chapters on the Principles of International Law,* Westlake outlines his view of "international society." He pays specific attention to it especially in the 10th and 11th principles. According to his perspective "The international society to which we belong and of which what we know as international law is the body of rules, comprises – *First*, all European states [...] *Secondly,* all American states [...] *Thirdly,* a few Christian states in other parts of the

was seen as a society of states with clear "geographical limits."[17] Spatially speaking, the "international" was regarded, in this period, as the aggregate of mainly European state territories, which share a common European sensibility of empire.[18] Within the colonial context of the late nineteenth century, even if the colonised regions where spatially excluded as peripheral to the European core (the "international" of international law), territory and physical spatial boundaries played a central role (alongside categories of "civilisation") in demarcating this core from the Other. In *The Gentle Civiliser of Nations*, Koskenniemi argues that "late nineteenth-century textbooks normally affirmed international law's non-applicability in non-civilised territory."[19] These "non-civilised territories" were treated as empty spaces or *terra nullius* and were therefore neither national nor international. It was the Other space which was needed for the "international" to be delimited and defined. In the following subsections I will expand on the three ways international law typically conceptualises the socio-spatiality of the "international": aggregate of state territories, international spaces and institutions.

### *5.2.1. Aggregate of State Territories*

The first way international law conceptualises the "international" is as the "aggregate of state spaces", which firmly identifies it as a physical space. This perspective, which fits the more mainstream international law theories quite well, arguably stems from the position that the "international" is the spatial aggregate of its parts and that the primary space in the international legal system is the territorial state. To use Zoe Pearson's words:

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world [...]." See J.Westlake, *Chapters on the Principles of International Law*. Cambridge: Cambridge University Press , 1894: 81.

[17] *Ibid.,* at 82.

[18] Further in this chapter I argue that seen from a different spatial lens, the international can actually be seen as a sensibility which during time transformed in essence but remained within the ideational/mental space of international lawyers with dreams, utopias and interests.

[19] M. Koskenniemi, *Gentle Civilizer. Supra* note: 15. Koskenniemi is referring for instance to the works of scholars such as Johann Kaspar, Bluntschli, Pasquale Fiore and Robert Adams.

> [t]he space of the state is pre-eminent in international law as reflected in the structures and processes of international law, where states' interactions are central to both the sources of international law, as well as being the primary subjects of international law. States and the community of states, for international law, are where law is created, implemented and enforced – in short, where law happens.[20]

In other words, if you look at international law as the set of norms and rules ordering the relations of states, then your international is nothing but the total of the states in relation. It is generally acceded that the territorial sovereignty of nation states is the dominant jurisdictional category in operation within both public and private international law.[21] Within international law the centrality of territory as the main spatial category "derives from the fact that it constitutes the tangible framework for the manifestation of power by the accepted authorities of the state in question."[22] What is often referred to as the expansion of the Westphalian state system through time (from the colonial to postcolonial eras) and space (from Western Europe to virtually all land mass on Earth) meant that a specific spatial sensibility was also disseminated across the world.

The idea of the "international" as the aggregate of state spaces is in turn based on the permanence and the characteristics of the current form of state within the spatio-temporality of international law. As Pahuja suggests, "for contemporary international lawyers, since the end of empire, the state and international law, have, for better or worse, both become universal, in the sense that they are everywhere."[23] This view leads to a "factish" view of the universality of states and their *form,* which then conditions the

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[20] Z. Pearson, "Spaces of International Law." *Supra* note 5, at 494

[21] As Pahuja puts it "in doctrinal terms, territory comes first in the form of the state, then comes sovereignty which is said to flow from statehood, then comes jurisdiction, understood as the rightful authority to speak the law." See S. Pahuja, "Laws of Encounter: A Jurisdictional Account of International Law [hereinafter "Laws of Encounter"]." *London Review of International Law* 1, no. 1 (2013): 69. For a brilliant in depth analysis of territory and jurisdiction see R. Ford, "Law's Territory (A History of Jurisdiction)." *Michigan Law Review* 97, no. 4 (1999): 843-930.

[22] M. N. Shaw, "Territory in International Law." *Netherlands Yearbook of International Law* 13 (1982): 31.

[23] S. Pahuja, Laws of Encounter. *Supra* note 21, at 74.

way we see the world they occupy and the sort of international we as international lawyers are dealing with. The dominance of this form of spatial ordering is rooted in nineteenth century colonialism and further solidified through the emergence and dominance of international institutions in the twentieth century. This was especially the case in the "radical project of transforming colonial territories into sovereign, independent states," commencing with the establishment of the Mandate System of the League of Nations.[24] This was the point that spatial management became further entrenched within the rubric of international law, controversially framed under the "sacred trust of civilization."[25]

Process oriented and subaltern approaches (such as TWAIL) to international law towards the end of the twentieth century still view the spatial aspect of international as being quite simply about "territoriality".[26] For instance, Richard Falk, in his critical reflection on the New Haven school of international law, argues for a "jurisprudence of human dignity."[27] In his argument he directly considers this jurisprudence to have a temporal and spatial dimension. However the spatial element of this perspective is typically reduced to "territorial affiliations of citizenship" and eventually sidelined for a preferred "time dimension".[28] In the same manner, much of the post-decolonization emancipatory literature in international law was and still is to some extent focused on realising emancipatory potentials for peoples who are viewed through their territorial

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[24] The Mandate System of the League of Nations was established under Article 22 of the Covenant of the League of Nations 1919. For a discussion see A. Anghie, *Imperialism, Sovereignty and the Making of International Law*. New York: Cambridge University Press, 2005: 115.

[25] Covenant of the League of Nations [1919] 112 BFSP 13: Art 22, paras. 1-2. A number of scholars have quite rightly brought this civilising framework of international law under question.

[26] See section 1.2.1 and 1.2.2.

[27] R. Falk, "Casting the Spell: The New Haven School of International Law [hereinafter "Casting the Spell"]." *Yale Law Journal*, 1995: 2008.

[28] *Ibid.* Note the dismissal of space and the preference of time here, which I have argued at different instances, characterises dominant critical positions not only in international law but more generally social theory.

affiliations to a physically delimited context.[29] For example the language of self-determination sees a people as belonging to a specific space to which (amongst other things) they are raising a claim. As peoples increasingly achieved independence in the second half of the twentieth century through self-determination claims, these groups joined a spatial logic already present in the dominant approaches to international law and its function. Even the language of human rights does not go beyond this spatial logic, since the legal structure behind international human rights relies on the state, and inevitably the territorial sensibility that accompanies it. This can be observed through the language of most human rights instruments, which are themselves inter-state treaties, which typically use phrasings such as "Each *State Party* to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant[...]."[30]

What this observation shows is the dominance of a socio-spatial sensibility which places physical spatiality (of the state) at the centre of international legal imagination of its "international". The dominance of physical space within international law also surfaces in accounts that portray international law as essentially "spaceless", since there is no specific and delimited physical space for the "international". However appealing this observation, it only goes further to confirm my point regarding the predominant spatial

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[29] The tradition of defining people through their relationship with land is even present in the works of the most sociologically minded international lawyers. For instance as shown by Monica García-Salmones Rovira in *The Project of Positivism in International Law,* Karl Fricker proposes three ways in which territory comes through the language of international law. In addition to seeing it as the property of the sovereign and a field of jurisdiction, he considers a third, people oriented idea of territory which puts the people in a direct relation with the authority of the government over a territory. Even though it is an important gesture to move to the "people" in characterising territory, it still fails to conceptualise people and their interrelations independently of territory. Social "togetherness" was imagined *in space,* and "The formation of states as a consequence of 'togetherness in space' was [was seen as] a manifestation of the social character of law. In other words, [territorial] *space made the political aspect of states possible."* M. García-Salmones Rovira, *The Project of Positivism in International Law*. Oxford: Oxford University Press, 2013: 318.

[30] See for instance International Covenant on Civil and Political Rights [1966] 999 UNTS 171: Art 2. (1); *or* Council of Europe Convention on Cybercrime [2001] ETS 185: Art 1.

logic within international law as physical. In a discourse where for the lack of an identifiable space, the whole spatiality of a category is dismissed, it only shows that the only types of spaces that international lawyers predominantly care about (and notice for that matter) are the physical ones, with clear identifiable boundaries to exclude. Apart from this, the observation of the "spacelessness" of the "international" should be read as inaccurate since within international law there *are* physical spaces which are identified directly as "international" which will be the focus of the next section of this chapter.

### *5.2.2. International Spaces*

Another important instance where the "international" is conceptualised by reference to physical space is regarding "the collection of anomalous or interstitial spaces."[31] The first group of spaces which comes to the mind of any international lawyer are the ones which are officially referred to as "international spaces". It is necessary to differentiate between spaces of the "international" (which is the broader subject of my analysis) and international spaces. The latter which is ironically the only place in mainstream international law where the words "international" and "space" are put next to one another, refer to the spaces where national sovereignty and state territory do not apply. Put differently, international spaces refer to types of space over which no one has territorial jurisdiction and cannot claim political/economic/social sovereignty. According to Oran R. Young's definition, international spaces "are *regions* and *resources* that lie *beyond* the reach of the legal and political jurisdiction of the individual members of international society."[32] The history of such spaces dates back to the sixteenth and seventeenth centuries, when extensive use of the seas (mainly for navigation and transportation, and serving colonial aspirations) gave rise to debates about the 'right' of

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[31] D. Delaney, *Nomospheric Investigations. Supra* note 3, at 61.

[32] O. R. Young, "Governing International Spaces: Antarctica and Beyond." In *Science Diplomacy: Antarctica, Science and the Governance of International Spaces*, edited by P. A. Berkman, Micheal A. Lang, David W. H. Walton and Oran R. Young. Washington: Smithsonian Institution Scholarly Press, 2011: 287.

states to open waters.[33] In addition to what is currently termed 'the high seas',[34] there are two other international spaces which have attracted considerable attention to themselves within the past century or so; the Antarctica and outer space. Although there are many differences between them in terms of history, scale and legal structures of governance, they are connected by at least two common characteristics; *lack* of sovereignty[35] and a common spatial sensibility.

Darrel C. Menthe, in his analysis of international spaces, argues that "what makes [international spaces] analogous is not any physical similarity, but their international, sovereign*less* quality."[36] As a way of treating such spaces, many concepts/principles have been employed across the ages. In fact for around three centuries the concept of international spaces did not exist as such in the vocabulary of states and international relations. Two other (Roman) legal concepts formed the background to the debate and thinking about the legal relation of nation states and such non-sovereign spaces; *res nullius and res communis*. The former, meaning literally "a thing of no one", meant that any state could assert its territorial jurisdiction, given a history of presence in the area. Eventually the latter concept, meaning "a common thing", won the day and was incorporated in many treaties and legal regimes such as the Law of the Sea Convention (1982) and the Outer Space Treaty (1967).[37] However 'commonage' as a concept is not

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[33] Although Gentili and Suarez had attempted the issue of the seas, the credit for the innovative approach which later led to the discourse of international spaces is generally given to Grotius. See B. H. Oxman, "The Territorial Temptation: A Siren Song at Sea." *The American Journal of International Law* 100 (2006): 830. See also M. D. Evans, "The Law of the Sea." In *International Law*, edited by Malcolm D. Evans, 651-686. Oxford: Oxford University Press, 2010: 651-652

[34] The high seas are also commonly called international waters.

[35] According to the UN Convention on the Law of the Sea, "[n]o State may validly purport to subject any part of the high seas to its sovereignty." See Convention on the Law of the Sea [1982] 1833 UNTS 3: Art. 87.

[36] D. C. Menthe, "Jurisdiction in Cyberspace: A Theory of International Spaces." *Michigan Telecommunication Technology Law Review* 4 (1998): 85.

[37] See Convention on the Law of the Sea, *Supra* note 35, Art. 136; *and* Outer Space Treaty [1967] 610 UNTS 205: Art. 136.

without its own nuances, and as I will argue further situates international spaces in the territorial sensibility of international law.

Dating back to the writings of Hugo Grotius,[38] the main concern was the use of the 'common' space (high seas in this case) as a facilitator of trade and exchange between sovereign (Christian) states, and there was little concern over underlying resources.[39] Moreover, with the growth in concern over the depletion of natural resources and the global environment, the issue of (non-)appropriation grew in importance and the attention of modern international law was turned to such spaces. The notion of non-appropriation as a condition of "common" spaces is visible in the text of most treaty regimes dealing with international spaces.[40] Non-appropriation formed the basic background of the international spaces discourse for the years to come. This issue was most importantly felt in the creation and the development of the concept of "common heritage of mankind", raised by Arvo Pardo, the Maltese Ambassador to the UN, in 1967, and written in the text of UNGA resolution 2749 in 1970.[41] However, as shown by Craven in the case of the Congo Basin in the later nineteenth century, non-appropriation still does not mean that states and their economic forces do not hold

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[38] In a section titled "To the Princes and Free States of the Christian World," taking a natural law position, Grotius argues that "as there are some things which every man enjoys in common with all other men, and as there are other things which are distinctly his and belong to no one else, just so has nature willed that some of the things which she has created for the use of mankind remain common to all and that others through the industry and labor of each man become his own." H. Grotius, *The Freedom of the Sea or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* [hereinafter *"Freedom of the Sea"*]. Edited by James Brown Scott. Translated by Ralph van Deman Magoffin. New York: Oxford University Press, 1916: 2. For Grotius's analysis of the common character of 'the sea' see pp. 22-44.

[39] This is with the exception of fishing. Grotius points out the importance of fisheries and navigation when he argues that "the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, *whether we consider it from the point of view of navigation or of fisheries."* H. Grotius, *Freedom of the Sea. Ibid.,* at 28. [Emphasis added]

[40] For examples of laws on the non-appropriation of international spaces see, for instance, Antarctic Treaty [1959] 402 UNTS 71: Art. 4.; *and* Convention on the High Seas [1958] 450 UNTS 11: Art. 2.

[41] UNGA, *Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction* [1970] XXV Res 2749

sway over the management and extraction of the resources in the common space.[42] After all, one main characteristic of commons is that even in the absence of ownership, everyone is free to utilise and extract resources – a problem to which the idea of "common heritage" was to be a response. However, despite this, it is still territorial states (for instance through the International Seabed Authority) which have the legal/political/economic leverage over the actualisation of the "common heritage".

Whether one negatively identifies international spaces (spatially or conceptually), what one ends up with is a set of frameworks of governance which conceptually and functionally depend on the territoriality of the state. This type of attitude incorporates international spaces into a discursive scene occupied and enclosed by the territorial organisation of global matters. As spaces which are explicitly referred to as "international" in international law, they demonstrate an important characteristic of international law's treatment of space and more specifically the spaces of the "international". Regardless of the historical period or school of thought, the spatial *delimitation* and *enclosure* of international spaces by territorial space of states is consistent. In other words, from the perspective of orthodox international lawyers, all spaces that are *not national* are then seen as *international* spaces. This form of negative identification puts national boundaries at the centre of the spatio-analytical frame of international law and further territorialises spaces such as the High Seas based on a set of accepted notions of spatiality associated with the spatial entity of the space, fixed within a physical understanding of space.

The treatment of the High Seas and their enclosure by sovereign territorial space of states demonstrates the logic of *logos* with regards to the articulation of the

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[42] M. Craven, "Re-Reading the Berlin Conference: International Law and the Logic of Extraction." *Sir Kenneth Bailey Memorial Lecture*, April 2012. Available at http://www.law.unimelb.edu.au/melbourne-law-school/news-and-events/watch-online/matthew-craven/flushcache/1/showdraft/1 (accessed 21 August, 2014)

"international" in the case of international spaces. What is interesting in the case of the High Seas, is that in the process of the creation and production of these spaces, and in the process of mapping and demarcating them, spaces are also separated by the forms of authority exercised within them. What it produced, is an object which can be mapped and demarcated; an object which represents of forms of authority and jurisdiction that can be exercised within it. For example, not only are international spaces defined outside of the sources of authority (states) that define the spaces in the first place (international treaty), the different demarcations within them, for example the exclusive economic zones,[43] contiguous zones,[44] continental shelves[45] and so on, are based not on demarcations but on the type of authority that can be practiced within these spaces. Therefore a detachment of authority from the physical demarcated space occurs while the same detached authority plays a direct role in demarcating the forms of jurisdiction in operation within that space.

### *5.2.3. Institutions*

In the third instance, the territorial sensibility of international law was further built into the very fabric of the post-WWII through the expansion of international institutions, in which the territoriality of states became (and arguably still remains) stabilised within the geographical mind-frame of the profession and discipline of international law. Regardless of the degree to which international organisations can be imagined as separate personalities within international law, the spatial logic of a largely state based system continues to govern these institutional apparatuses. Most of the members of international organisations are states and the constituent instruments are usually inter-state treaties. In addition, international organisations are often bodies which are directly

[43] Convention on the Law of the Sea [1982] 1833 UNTS 3: Part. V, Art 55.
[44] *Ibid.,* Art. 33.
[45] *Ibid.,* Part VI, Art 76.

identified with a conglomeration of territories. Institutions such as the African Union or the European Union are associated with a more distinct *region* which again consists of a collection of state territories. Any attempt to include more and more actors and personalities in a system which is spatially determined through the boundaries of its state members, sees the spatiality of the "international" as circumscribed by the initial dominance of territory.

The importance of international institutions to the territorial logic of international law is not limited to the dominance of the territorial state as the most important category of the discipline and practice. Identifying the "international" with "anomalous or interstitial" spaces brings international institutions and organisations into frame as well. In addition to ensuring the predominance of the spatiality of states (and hence the "aggregate" theory of the "international"), international institutions are entities within international law that are at least formally distinct from the sovereign (territorial) prerogative, since they are recognised as legal personalities and have legal duties (and rights) under the international legal system. As Akande states, the immunities granted to international organizations,[46] "preserve the independence of [an] organization from its member States and [secure] *the international character* of the organization."[47] Yet, the spatial significance of these so-called "bodies" of international law is that they have both a bodily and an "outer body" spatiality, both of which can be regarded as spaces of international. The very space occupied by their buildings or the occasional international conferences organised around the world (often in big cities) are very much spaces *within*

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[46] Since international organizations have a range of responsibilities and their legal personality is recognized by international law, they are granted a range of immunities and privileges. For an overview of these see D. Akande, "International Organizations." In *International Law*, edited by Malcolm D. Evans. Oxford: Oxford University Press, 2010: 271-276. For an extensive commentary on the nature, functions and characteristics of the United Nations, see B. Simma, *et al.* (eds.), *The Charter of the United Nations: A commentary.* 3rd. Oxford: Oxford University Press, 2012.

[47] D. Akande, "International Organizations." *Ibid.,* at 271. [Emphasis added]

which the "international" happens, or exists, in a way distinct from the national or urban spaces. In this way, they appear as cuttings from a map which is largely dominated by spaces which are either strictly seen as state territories or non-sovereign spaces such as the international spaces.

These spaces are also distinguished from the national space within almost all relevant constituent treaties, where "the premises of an international organization are to be inviolable" and the property and assets belonging to the organization are immune from any form of interference by state authorities.[48] These provisions highlight the attention paid to the bounded space, or the "body" of the international organization. These spaces which are usually located within major cities of the Global North such as London (IMO), New York (UN), Geneva (WIPO), Paris (UNESCO), Rome (FAO) and Addis Ababa (AU), are officially separated from the sovereign space of the nation state they are located in, and hence become "international". This understanding of the concept is similar to its application to "international spaces" (High Seas, Antarctica, etc.), the spatiality of which is negatively identified with the territoriality of nation states. In the case of the premises of the IOs, it is often the bounded city space which acts as the negative identifier of their internationality. It is here that the "international" becomes "visible" by being associated with a specific bounded, physical space.

So far I have demonstrated two main categories of analysis, through which the "international" of international law is dominated by a territorial sensibility of space, namely as an "aggregate of state territories" and "interstitial spaces" (including international spaces and international institutions/organisations). In all the categories discussed, physical spatiality is the dominant form of space constructing the "international" in international law. However, as argued earlier, a legal framework which

[48] See for instance Charter of the United Nations [1945] TS 993: Art. II, Sec. 3; *or* Convention on the Privileges and Immunities of the United Nations [1946] 1 UNTS 15: Art III, sec. 9.

focuses on physical space (and hence assumes the logic of *logos*), carries with it a parallel commitment to "mental space". This is an abstract space where the authority of law is fixed and abstracted away from the socio-political fluidity of everyday life, and through this law is distinguished from "politics". International law, thus, holds onto a binary perspective of physical/mental space. In the next section I will expand on the importance of mental spaces "over and above" territoriality for international law.

## 5.3. The "Over and Above" of International Law: Universals, Utopias and Commitments

> *Utopia is a form: traditionally, a traveller's account of a visit to an imaginary country where the journey is either to a far-off land or to the distant future.*
>
> *K. Knop*

In addition to the territoriality of the "international", Delaney points to another important characterisation of the "international". This view "posits the international as a global space that is 'over and above,' at least *conceptually distinct* from, the sum of domestic spaces."[49] In this section I explore some of the different forms by which this global (universal) space, detached from the material reality of physical space, comes through in the vernacular of international law. What I am exploring here is the sense or understanding of "international" *implied* by different approaches to international law. In other words, I discuss the categories and conceptual frameworks through which international law is not only seen as *law* but importantly for this section as *international.* The conceptual distinction between physical (territorial) and mental (abstract) space maintained in this analysis, reflects the spatio-legal conceptual framework of *logos.*

[49] D. Delaney, *Nomospheric Investigations. Supra* note 3, at 61.

When thinking about "spaces over and above" the first and most important spatial categories that come to mind are utopias and universals. Not so surprisingly these two categories have a long history in international law, perhaps as long as the age of the whole discipline. Utopia is a concept which was created by Thomas More out of a synthesis of *eu-topos* (literally meaning "good place") and *ou-topos* (literally meaning a "no place").[50] Karen Knop speaks of a "familiar sense" of utopia in international law which consists of "seeing and wishing for the emergence of an international legal community unified by more than just the consent of states."[51] This "seeing and wishing" can be associated with many aspirations to form a future of peace, prosperity and order amongst the "collectivity" of our societies. The aspirations reflect the projection of the sense of utopia in international law into a desired future.

This utopian aspiration of international law, in imagining the unity and collectivity of all societies, arguably has its roots in non-consensual forms of legal thinking that have had a clear role in the development of international legal thought, namely Natural Law and the *jus gentium*. The latter, which has its roots in Roman law, is the law that sits above the collectivity of human beings,[52] universally ordering their relations and conduct in its entirety.[53] As a concept which played an important role in the theories of international law pioneers such as Suarez, Vitoria and Grotius, it was based on shared principles of human society (imagined as society in its totality) which was imagined to transcend

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[50] See generally T. More, *Utopia*. Edited by George M. Logan and Robert M. Adams. Cambridge: Cambridge University Press, 2002. For an analysis of utopia with respect to international law see K. Knop, "Utopia without Apology: Form and Imagination in the Work of Ronald St. John Macdonald [hereinafter "Utopia without Apology"]." *Canadian Yearbook of International Law* , 2002: 287-307.

[51] Karen Knop, "Utopia without Apology." *Ibid.,* at 287.

[52] The distinction between natural law and *jus gentium* is that the latter is specifically about human beings and their relation to one another. However they are both applicable to everyone (and everything), hence assume a universal character.

[53] For reflections on *jus gentium* see Shaw, Macolm N. *International Law*. Cambridge: Cambridge University Press, 2003: 16-18. See also S. C. Neff, "A Short History of International Law." In *International Law*, edited by Malcolm D. Evans, 3-31. Oxford: Oxford University Press, 2010.

territorial boundaries; as if sitting "over and above".[54] Detached from the particularities of actual/territorial societies, the *jus gentium* orders relations differently from the *jus inter gentes*. While the latter involved an inter-relational (ascending) ordering of discourse amongst pre-existing territorial entities which constructed the "international" through their collectivity, for the *jus gentium,* the "international" becomes associated with the "spacelessness" (space understood physically) of an assumed universality, pre-existing and transcending the relations to which it is to be applied.

This "spacelessness", or abstract international, arguably comes through today's international law, via categories ranging from humanitarian intervention, developmentalism, responsibility to protect, etc. For example, the responsibility to the protect doctrine "is built around the premises that state sovereignty is not a closing off of domestic space of the state."[55] In order to imagine the "international" as "open", as opposed to the "closing off" of territorial sovereignty (the domestic space of the state), responsibility to protect locates the responsibility in a mental/utopian space which is not limited by the conceptual and practical limitations of the dominance of the territorial state. This then allows the international lawyers to look at a "situation" or "crisis" through an "international" lens, but an international which exists over and above the aggregate of territorial states in the shape of values, morals or principles. Even though desires to "protect" founded on such abstract premises have been widely criticised, especially in the last two or three decades,[56] what is relevant for my analysis is

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[54] It should be noted that this society did not necessarily involve all of humanity and was largely imagined to be European and essentially Christian. However what is important for my analysis is not the content of the principles but the space they occupy in the imagination of international lawyers.

[55] G. Heathcote, "Splitting the Subject: Feminist Thinking on Sovereignty." *Draft Copy With the Author*, 2013: 5.

[56] Such critiques often see utopian visions of a "good place" as only partial and unrepresentative of the claimed "collectivity," merely serving as apologies for empire and hegemony. Pahuja summarises these positions beautifully when she argues "it is relatively clear why we should be uneasy with the desire to save the world [...] After the critique of the trope of salvation and the

how these commitments occupy utopian spaces in international law. In other words this demonstrates how as an essentially spatial concept, utopia has played a considerable role in the theory, practice and production of international law through the denial of its own space. Utopian ideals at the heart of international legal thought, entrenched within its claim to universality, only seek refuge for the "international" within a *wish,* a "good place" which is essentially a "no place" at the same time.

The sense of utopia suggested by Knop is present every time an international lawyer makes a claim to universality. An association with the utopian ideals means that in order for something to be international, or *to become* international, it must have certain "universal" *qualities.*[57] The act of qualifying something as "international" dates back to the colonial era and the shaping of the universal appeal of order on a global scale. Annelise Riles in her influential reflection on the role of scale and perspective in the internationalisation of occurrences "on the ground" (in her analysis of Fiji), argues that international law trains "citizens and governments who see only local events [...] to conceptualize them as events occurring also on an international plane."[58] Therefore the international lawyers' task becomes "both to view the world in a way that makes possible a difference of dimension, and to maintain a boundary that delineates and defines the cosmopolitan space."[59] At the root of this proposition is the claim that even though almost everything can be so to speak "raised" to an international plane, the

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identification of its tenacious hold on international law as an underlying philosophy of history, it is possible to see the desire to save as the continuation of the 'benevolence of Empire." See S. Pahuja, "Laws of Encounter: A Jurisdictional Account of International Law." *London Review of International Law* 1, no. 1 (2013): 96.

[57] I am using the term "quality" here similar to the way Sundhya Pahuja uses the term in her book Decolonizing International Law. See S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* [hereinafter *"Decolonising International Law"*] . Cambridge: Cambridge University Press, 2011: 1-44.

[58] A. Riles, "The View From the International Plane: Perspective and Scale in the Architecture of Colonial International law [hereninafter "International Plane"]." In *Laws of the Postcolonial*, edited by E Darian-Smith and P Fitzpatrik. Michigan: The University of Michigan Press, 1999: 134.

[59] A. Riles, "International Plane." *Ibid.*

maintenance of the "cosmopolitan space" acts as a condition for claiming the "international" tag. Therefore, in the process of conceptualising, events are raised to a mental space over and above and hence gain the quality of being "international".

The view of the "international" as a space "over and above", can, furthermore, be identified with the works of scholars and practitioners of international law (positivist or not) who subscribe to Kantian ideas of cosmopolitan world order.[60] Building on the "high liberalism of a century before" influential thinkers such as Hersch Lauterpacht and Hans Kelsen believed in "utopian federalism, liberal humanism, and the associated values of cosmopolitan individualism."[61] Fernando Teson, in his account of *The Kantian Theory of International Law*, characterises the federal cosmopolitan view of international law as being based on three universal, *a priori*, principles of freedom, due process and equality. Within this view, the "international" is represented by the universal values and principles which are the foundations of an imagined or "utopian" dream of a world constitutional order. To put this in spatial terms then, the cosmopolitan international belongs to a utopian spatial order, as distinguished from the physical spatiality of the world. Of course this does not mean that for the cosmopolitan dreamers, the "real" world did not matter. To both Kantian and non-Kantian proponents of a cosmopolitan world order, the state, territory and the relations between them (subjective or objective) were of particular importance.[62] What made (and still makes) international law "international" for these thinkers was not the aggregation of state territories, or

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[60] See for instance A. Cassese, *International Law*. 2nd. Oxford: Oxford University Press, 2005: 21.
[61] See M. Koskenniemi, *Gentle Civilizer*. *Supra* note 15, at 356-357. For an account of the "high liberalism" of the mid 19th century, see W. Ropke, "Economic Order and International Law." *Recueil De Cours*, 1954: 209-250. For examples of Lauterpacht's vision towards international law, see H. Lauterpacht, *The Function of Law in the International Community*. New Jersey: The Lawbook Exchange Ltd, 2000; *and* H. Lauterpacht, "Westlake and Present Day International Law." *Economica*, no. 15 (November 1925): 307-325. Or for a thorough analysis of Lauterpacht's life and thought, see M. Koskenniemi, *Gentle Civilizer*. At 353-412.
[62] M. García-Salmones Rovira, *The Project of Positivism in International Law*. *Supra* note 29, at 189-197.

individuals ordered under a federal system. The physical spaces and entities are deemed "international" only in so far as they are associated with the universally shared, a priori, values and principles.

For the cosmopolitan visions of international law, physical space is largely treated as a presupposed condition, pre-existing the authority which then speaks the law, or better say in the name of law. Territorial space of a state is both the object of regulation and the "source" of international law only in so far as it reflects the utopian principles and values shared in the *as if* world constitution which constitutes the international legal framework. According to Monica Garcia-Salmones Rovira, for the Kantian international lawyers "the natural qualities of the external world, for example of the territory, the elements forming its reality, had nothing to do with law."[63] In this way law becomes independent of physical space, and the latter only appears as territory representing the formal distinctions of jurisdiction, conditioning the ability of actors to legislate on "international" matters. Individuals on the other hand become reduced to rights bearers (with respect to the state and wider cosmopolitan order) and/or trade partners and economic competitors (with respect to each other within the wider cosmopolitan society of human beings). One of the most important theorists who formalised legal matters (both national and international) to the point of almost absolute detachment from the social, political and spatial reality is Kelsen, for whom "all legal acts must derive from a single basic norm which in turn legitimizes the first positive norm, the constitution."[64] In this (cosmopolitan) approach, the legal "international" belongs to (and is derived from) the self-referential interplay between the *as if* constitution and the basic norm, neither of which have a physical/spatial ontology.

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[63] *Ibid.,* at 191.

[64] F. Teson, "The Kantian Theory of International Law." *Columbia Law Review* 92, no. 1 (1992): 66

The cosmopolitan sensibility provides us with a different (and arguably complementary) notion of "international", still acting as a spatial referent of international law but seen through a different view of space. Even though territoriality was still the dominant notions of space for international lawyers with a cosmopolitan worldview, i.e. they understood spatiality in its physical/material sense through the aggregate of state spaces, their claims to universality imply the reliance on detached, mental or transcendent criteria accessed through an abstract (shared) space. Koskenniemi points out that "universalist conceptions of international law represented by Enlightenment jurists" did not fall "due to the rise of 'positivism' in the late nineteenth century," but continued to affect international lawyers in the form of "morality and natural law."[65] This was the means through which actors otherwise territorially excluded, became included through a reliance on an "international" which consisted not primarily of sovereign bounded states, but of values and principles of treating humans alike from a position of neutrality. As Koskenniemi shows, the non-applicability of international law to non-civilised territory was "not without provision made for the universal validity of humanitarianism and natural law principles or human rights."[66] It is this perspective that carries on until today in treating the "international" as a "trouble-free, neutral space."[67] In order to ensure this neutrality and universality, mainstream international lawyers then need to ensure themselves a "view from nowhere in particular,"[68] so that they avoid the otherwise troublesome realm of everyday realities of life in the world, and to ensure their commitment to a sense of humanist or cosmopolitan progressivism.[69] This in turn prompts them to either treat the social contexts either as

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[65] M. Koskenniemi, *Gentle Civilizer*. *Supra* note 15, at 130-131.
[66] *Ibid.*, at 128.
[67] D. Buss. "Austerlitz and International Law: A Feminist Reading at the Boundaries." *Supra* note 5, at 87.
[68] A. Riles, "International Plane." *Supra* note 58, at 133.
[69] Koskenniemi suggests that any commitment to international law "still implies a commitment to a mild cosmopolitan progressivism." M. Koskenniemi, *Gentle Civilizer*. *Supra* note 15, at 514.

irrelevant for international law (e.g. by distinguishing them as "domestic" or "national" concerns) or to treat them through the detached lens of regulation, only reluctantly dealing with social phenomena through the vocabularies such as human rights and development. This further reinforces the spacelessness of the "international" as "over and above" the everyday socio-political processes.

Certain sociological approaches to international law in the early twentieth century, e.g. those of George Scelle and Alejandro Alvarez, conceptualised the universality of international law differently, through their "vision" of social solidarity amongst everyone, but their conception of sociality remained a utopia, to be sidelined by other commitments after the WWII.[70] In Koskenniemi's words, for this group of international lawyers (largely from inter-war France), "the state becomes an ephemeral, almost transparent form, at best an instrument or a "function" – sometimes a metaphor – for actions of the social collectivity that encompass all aspects of the lives of individuals."[71] However, the way they substantiated this utopian *vision* was by relying on assumptions of free individuals, represented through different professions who have the people's utility at the heart of their collaborative operations. George Scelle, an important figure in French solidarism, saw the international system "as an aggregate of individuals, living through varying solidarities," with the role of "law as a translation of social or moral necessities."[72] Even though this was a radical view of the international system, it still relied upon the mediating role of state which exercised a double function connecting the social experience of the individual in society to the higher order of international law.

What is important for my analysis is that the ideas of the "international" being made of people as a unitary society of (hu)mankind, only remained in the realm of mental space

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[70] For an authoritative account of "solidarism" in international law (1871-1950), see M Koskenniemi, *Gentle Civilizer. Ibid.,* at 266-352.
[71] *Ibid.,* at 268.
[72] *Ibid.*, at 338.

and the only real sociality continued to be the world of formal treaty negotiations and the pragmatic operation of experts within international organisations. This political reality was arguably further reinforced through the instrumentalist approaches to international law within the Cold War period.[73] International law remained in need of commitments to define itself as "law" (and "international") and at the same time the need to be situated within the political reality of the world for those commitments to cut.

As Pearson observes this then creates an international law which is "created by global elites in exclusive hierarchical spaces [such as international conferences and institutions]; [with a conception of] law portrayed as neutral and aspatial but based on partial perspectives; law as *removed from the space of the realms in which it is lived, from space of diverse participation."*[74] This is a point also raised by Pahuja who describes international law as "spatially 'transcendent'," especially in its relation to commitments to justice. These commitments often manifest themselves through international institutions and the principles of justice and equality within their constituent instruments and treaties.[75] Therefore in addition to being characterised in terms of physical/territorial space (either representing the aggregate of territorial states or physically occupying a delimited space), international institutions can also be seen to "represent the concrete manifestation of the normative aspirations of law in the international system."[76] In this reading of international institutions, the "international" ceases to be solely about the aggregate of its member states. It also stops being necessarily associated with a specific physical/spatial location of the institution or its conferences. Instead the "international"

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[73] For a great analysis of the post-WWII instrumentalism in international legal theory, see I. Scobbie, "Wicked Heresies or Legitimate Perspectives? Theory and International Law." In *International law*, edited by Malcolm D. Evans, 58-94. Oxford: Oxford University Press, 2010.
[74] Z. Pearson, "Spaces of International Law." *Supra* note 5, at 504. [Emphasis added]
[75] See for instance the language of Charter of the United Nations Art 1(1) and Art 2(4).
[76] B. Rajagopal. *International Law from Below: Development, Social Movements and Third World Resistence* [hereinafter *"International Law from below"*]. New York: Cambridge University Press, 2003: 40.

through international institutions comes to act as the spatial referent of imagined aspirations and commitments belonging to an ideational/mental space, being represented and manifested through the operations and action of the institution.

An example of the operation of this mental space through the institutional structure of international law is provided by Pahuja's discussion of the case of Permanent Sovereignty over Natural Resources (PSNR, within the context of the New International Economic Order).[77] The movement which was launched by a group of Third World states for the international recognition of their economic control over their natural and economic resources soon fell in the process of being characterised as "international" in order to take concrete legal effect. As Pahuja shows, once this claim entered the sphere of international law, it was "transformed by, and subsumed within, a nascent regulatory framework dealing with foreign investment. The transformation occurred via the *projection and stabilisation of a particular meaning for the 'international' sphere.*"[78] Pahuja then goes on to claim that "the *transcendent* positioning of development and economic growth," as "universal" commitments of international law, acted as the main stabilisers of the claims of PSNR as "international" within the institutional framework of international law. Since the institutionalisation of international law, especially from the end of the Second World War onwards, institutions come to embody different "domains" of the commitments of international law, and economic development is no exception.

Another example of the institutional manifestation of the "international" belonging to a space "over and above" is the transformation of the cosmopolitan principles into categories such as universal human rights through institutional frameworks. In the

[77] The PSNR, is an initiative launched by the Third Word in the 1950s and 1960s in order for them to assert more control over their assets and economies. For a detailed discussion see S. Pahuja, *Decolonising International Law*. *Supra* note 57, at 95-172.
[78] *Ibid.,* 96.

absence of natural law, international human rights norms and laws are probably one of the most important offshoots of the Kantian categories within modern day international law. International human rights which are based on (and encapsulate) principles such as individual freedom and equality, require the Kantian notion of categorical imperative to provide "crucial support for the universality of human rights."[79] The existence of rights and duties which are imagined beyond national/territorial borders require an image or a supposed awareness of a "world society" in which individuals are not divided by national and cultural boundaries, and united through their mere "humanness". However, the reality of international law, its subjects and institutions does not spatially reflect the existence of such a society. As a result, the debate over human rights is often fraught with claims of contextual relativism.[80] Given the prominence of ideals and principles behind the international human rights regime, this union of values and principles (taking the shape of laws, rights and duties) exists in the utopian/abstract space of universality and represented through international institutions and legal frameworks. This in turn gives authority and validity to the claims of international institutions and states who act on the basis of those values and commitments, further reinforcing the detachment of the mental space of the "international" from the domestic (physical) spaces where human beings and societies are seen to exist.

Therefore seeing the "international" as a space "over and above" and conceptually distinct from the collection of states is central to international law (parallel to the

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[79] F. Teson, "The Kantian Theory of International Law." *Columbia Law Review* 92, no. 1 (1992): 64. According to Kantian theory, the Categorical Imperative is the fundamental principle which acts as an unconditional command for our will to act "morally." This principle is fundamental to Kant's moral philosophy in general and has had a significant influence in what one might refer to as Enlightenment jurisprudence. On Kant's philosophy of Categorical Imperative see H. E. Allison, *Kant's Transcendental Idealism: An Interpretation and Defense.* Revised and Enlarged. Yale University Press, 2004.

[80] On the relativism of human rights and paradoxical character of the discourse see C. Douzinas, *Human Rights and Empire: the Political Philosophy of Cosmopolitanism.* New York: Routledge-Cavendish, 2007; *or* D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism.* Princeton: Princeton University Press, 2004.

continued importance of territory). This "over and above" character of the "international" is then manifested through the operation of states, international institutions or international courts and tribunals (in the form of universal principles of justice, etc.). It is in critique of this perspective that Koskenniemi argues that "because no position or policy may be identified with the international spirit as such, and even if it were, there would be no guarantee of its beneficiality, taking on the 'international' as the space for one's commitment is meaningless [...]"[81] However in the lack of an identifiable physical spatial referent for the "international",[82] the "utopian" (mental) space of our commitment to ideals, dreams and values of (international) law become associated with the "international". Yet, taking the "international" as belonging to the mental space of commitments is meaningless when that space is empty of social experience. As I will expand further in the next chapter in the case of non-territorial social movements, the existence of an "international [social] spirit" requires accessing a sociality which neither relies on the abstract space of commitments, nor is enclosed within the territorially bounded ideas of society and space. If international law has the conceptual tools to access the co-constitution of the international spirit in its socio-spatiality, it can neither cling on to territory, nor detach from space entirely. This is the form of social space *nomos* provides conceptual access to and it is my intention to expand on it in the next chapter. However, before proceeding to the analysis of *nomos* and international law, I will point to two important and interrelated critical projects in international legal theory which help demonstrate the interconnectedness of the spatial sensibilities of international law (demonstrated above) with the structure of the international legal argument and its critical instability.

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[81] See generally M. Koskenniemi, *Gentle Civilizer*. *Supra* note 15, at 514.

[82] This is if we see the state territory, therefore the "national" territory, as the basis of the physical notions of spatiality in international law.

## 5.4. *Logos:* Koskenniemi, Pahuja and the Critical Instability of International Law

One of the clearest articulations of international law that highlights the dominance of *logos* can be found in Pahuja's analysis of the "critical instability of international law."[83] Pahuja's reflections on the critical instability of international law are an articulation of *logos* in international legal theory and practice, and more specifically with regards to fundamental categories such as the "international". According to Pahuja, fundamental categories like the "international" are not seen as pre-existing international law but instead produced through international law both as the subjects of law, as well as its objects of regulation. This (discursive) self-constitution is on a definitional level, responding to the questions that include "what is law" and "what is international". Therefore "international law's claim to be defined as 'law' (and indeed, to be 'international' law) relies upon a self-constitutive gesture in which it is cut from its others and *raised to the status of universality.*"[84] This "quality" of international law, referred to by Pahuja as "postcoloniality of international law,"[85] acts as a guarantor for its legal authority and claim to normativity. So in this process the "international" appears to be simultaneously constituted as a conceptually delimited category while being detached from the contingent reality of society and politics. Hence, the "international" in international law is placed in a privileged position, alongside law, "cut from a plurality of forms of ordering, which are then defined as something else – [what law [read

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[83] S. Pahuja, *Decolonising International Law*. *Supra* note 57, at 26.

[84] *Ibid.,* at 27. [Emphasis added] See also at 97. Pahuja is borrowing the notion of 'cut' From Jacques Derrida's "Force of Law: The "Mystical Foundation of Authority."

[85] Pahuja uses postcolonial theory mainly as a "style of engagement," which focuses on the way categorisations operate within "imperial and post-imperial contexts," on how Western identities and categories are constantly "constituted in opposition to an alterity that it has itself constructed." S. Pahuja, *Decolonizing International Law*. *Ibid.*, at 27. Pahuja quoting E. Darian-Smith, and P. Fitzpatrick (eds.), *Laws of the Postcolonial: Law, Meaning and Violence.* Michigan: University of Michigan Press, 1999: 1.

"international"] is 'not'] – and denied the status of law [read "international"]."[86] This detachment reflects my analysis of the "international" as belonging to a space "over and above".

Defined and cut through the postcolonial quality of international law, the fundamental categories such as the "international" are also situated within the "political" quality of (international) law. Pahuja uses the word "political" to accommodate a specific meaning. For her this quality of law refers to "the gap between positive international law and its aspirational relationship to an idea of justice."[87] This gap is to a large extent consistent with the "postcolonial" quality of international law. It is the gap between this transcendence and the body of international rules and customs that characterise what she calls the "politics of international law."[88] The spatial transcendence of the commitments to justice, values and morality are arguably what qualifies the body of rules in a positivist understanding both as international and as law, while simultaneously situating them within the aggregate of state territories. From a cosmopolitan or a solidarist lens, even though the goal is to characterise the "international" sociologically, the sociology remains a utopian *vision* of a single society of human beings. It is utopian since human beings have so far largely been unable to communicate and interact on a multi-party basis unless through their representatives (political and economic). The "international" is imagined as an abstract, neutral space of commitments "over and above", detached from the aggregate of state-spaces.

The requirement of international law to constantly define itself as something more than just "rules-plus-violence" requires a claim to "justice" which is reached through a claim to universality. What Pahuja calls international law's "promise", is constantly evaluated

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[86] S. Pahuja, *Decolonising International Law. Ibid.,* at 28.
[87] *Ibid.,* at 33.
[88] *Ibid.*, at 36.

and criticised with respect to the constructed categories and political dynamics of international law, acting as a motive/impulse for any form of deconstruction (and reconstruction) of (international) law. The simultaneous existence of fundamental claims of justice and universality alongside a claim to political situatedness is how I suggest Pahuja's theory articulates the idea of *logos* in the context of international law. This is because it locates the "international" both in the material space of politics and detached through the mental/abstract space of commitments to values and justice.

A second influential theory which I associate with *logos* in this project is Martti Koskenniemi's characterisation of the international legal argument in *From Apology to Utopia.* In this seminal text, Koskenniemi famously characterised the nature of the international legal argument as indeterminate, claiming that "indeterminacy is an absolutely central aspect of international law's acceptability."[89] As identified by Koskenniemi, international law becomes indeterminate because of it political character, being stuck between claims of concreteness and objectivity of international legal rules.[90] Even if we accept this "middle-ground" characterisation of international law by Koskenniemi, international law remains a legal system, with a set of legal rules and principles (however contextually dependant) which need (at least the claim to) determinacy *and* objectivity in dealing with different phenomena and cases. The constant need for a detachment from material reality for purposes of *normativity* is exactly what distinguishes international law from pure politics and process. Contemporary international lawyers (from the positivists to the critics) see the need for international law being more than "mere sociological description," and seek to come up

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[89] M. Koskenniemi, *From Apology to Utopia*. *Supra* note 10, at 591.

[90] As also mentioned by Pahuja herself, the use of the word "political" for Koskenniemi is similar to her suggestion of the "political" quality of international law. This being said, she does distinguish her approach from Koskenniemi's especially with respect to the latter's use of the word in the seminal article called "*The Politics of International Law."* See S. Pahuja, *Decolonising International law. Supra* note 57, at 33*,* note 80. See also M. Koskenniemi, "The Politics of International Law." *European Journal of International Law* 1, no. 4 (1990): 4-32.

with ways of ensuring the lawness of international law, while keeping "in touch" with sociological and political processes.

The argument put forward by Koskenniemi is similar to Pahuja's position regarding the "critical instability of international law," since it requires most international law scholars [...] [to] continue to treat international law as a 'hybrid' being which keeps in contact with reality without being totally absorbed by it."[91] It is through this position that the law takes on the character of *logos,* at the same time being "both 'within' and 'outside' the world" holding on to the detachment characterising it as *logos*. It is outside the world through the characteristic detachment of law from the socio-spatial reality; at the same time it is within the world, through a relation of regulation and control ("rules-plus-violence"[92]), still treating reality as an object of regulation. In other words, even though (international) law is always "located" in socio-political reality, it always remains "law" through the detachment of its authority from that reality and placing it "over and above" to ensure universality.

To sum up, Pahuja and Koskenniemi both demonstrate the need for the "detachment" of law and legal "authority" from the everyday socio-political realities in order to underpin a claim to universality (even though it might be invisible to uncritical eye). On the other hand, since the rise of positivism and the formation of a tradition of international law, this claim to universality is always accompanied by a need for concreteness. Different approaches to international law differ on the basis of how to characterise the processes and contexts of international law, and whether they prioritize (and emphasise) the political and sociological context of international law over its legal (rule/regulation based and a-contextual) character.

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[91] C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice*. Oxford: Oxford University Press, 2012: 113.
[92] I am borrowing this phrase from Pahuja.

The central theme of this chapter is to offer a description of the "international" as implied by predominant approaches to international law. Through this description, a specific logic behind international law's view of its own "international" is apparent. On the one hand, using the insights of scholars such as Koskenniemi and Pahuja, the international legal argument can be characterised by a spatio-legal detachment and fixity associated with the normative claim of "the legal" through utopia. On the other hand in order for the categories and doctrines to be concrete, a certain socio-spatial setting has to correspond to the law. However, this sociological base for the law is constantly detached from "the legal" in order to ensure a universal position through which international law's regulatory (law-like) character can be achieved. This form of regulation centred relationship between law and the social context (as the object of regulation) can be seen as the first step in tracing the logic of *logos* in most approaches to law within the international legal tradition.

A parallel spatio-legal dichotomy affects the imagination of the international lawyer with regards to the "what" and the "where" of the "international". Analysing the different ways the "international" is imagined (spatially) in international law (following Delaney), the concept tends to be, broadly speaking, stuck within the modern spatial binary of material (physical space)/ discursive (mental space). The "international" is seen through categories and entities which are either based operationally and fundamentally on a territorial understanding of state spaces, or somehow "cut-out" of the spaces dominated by states in order through negative identification. In the latter, the "international" is then identified as any space which is either not claimed by the category of the national (the High Seas, outer space, etc.), or somehow identified as a distinct space within the territorial boundaries of the state or municipality (institution headquarters, conference spaces, etc.). From these perspectives, the "international" is then associated with categories and entities using the notion of physical space. It is through observing the

"international" as within real/physical space that the requirement for the concreteness of international legal argument is also fulfilled.

Yet despite the above, "international law's claim to be defined as 'law' (and indeed, to be 'international' law) relies upon a self-constitutive gesture in which it is cut from its others and raised to the status of universality."[93] Spatially, at the same time as the "international" is, so to speak, left on the ground, it is "raised" to an abstract space of universality; the mental space of all other principles and values associated with the universal character of law and its authority. After all, the idea of a cosmopolitan social space characterised by an international solidarism or a cosmopolitan humanism were mere "visions;"[94] abstract utopian spaces, in need of materialisation; a materialisation that only really happened (and was accepted by international law) within the context of international institutions and inter-governmental organisations. It is the existence of this persistent dichotomy between mental and physical space in the construction and predominant understanding of "international" in international law that arguably mirrors the indeterminacy of the legal argument, or its "post-colonial" quality highlighted by Koskenniemi and Pahuja.

Consequently, with regard to the legal and spatial treatment of the "international" in international law (both in its traditional and critical variants), it is possible to demonstrate a predominant conceptualisation of the "international" as *logos*. The mental/physical binary of space within international law mirrors *and* arguably reinforces the detachment between law's authoritative space *and* the "apologetic" sense of real world (political) relations and spaces which are always uncomfortably positioned

[93] S. Pahuja, *Decolonising International Law*. *Supra* note 57, at 27.
[94] In the epilogue of the Gentle Civilizer of Nations, Koskenniemi announces that "[t]he *vision* of a single social space of "the international" has been replaced by a fragmented, or kaleiodoscopic understanding of the world where the new configurations of space and time have completely mixed up what is particular and what universal." See M. Koskenniemi, Gen*tle Civilizer*. *Supra* note 15, at 515.

together. The real/physical spaces become objects of regulation, while also being the site and products of the "political" process of law. This regulatory character of international law enshrined in *logos*, be it motivated through idealistic/utopian dreams or a series of interrelated material "interests",[95] performs the defining, cutting and spatialisation of the "international" either as an object of regulation or a mental space of commitments, values and *visions*.

What I have argued regarding the nature of the predominant understanding of the "international" in international law commences from a descriptive account. By exploring the types of space used in the imagination of international law regarding the "international" (as suggested by Delaney), and combining them with critical observations regarding the form of the international legal argument, I have only applied half of my conceptual framework to the subject matter of my analysis. As I have argued previously, the aim of this thesis in not just to describe but to attempt a re-description according to a different legal/spatial framework (*nomos)* so as to be able to understand and engage with forms of everyday non-territorial social experience.

As we are reminded by the spatial heroes of this project, i.e., Foucault, Delaney and Massey, space and society are non-separable. Therefore, viewing the "international" through the spatiality of *logos* which separates the two, limits the forms of sociality international law tends to take into account. In instances when the existence of a sociality is presumed as the basis for an international legal system/community, that community is either reduced to the community of states, or the social relations amongst experts, professionals and academics who communicate within certain physical spaces

[95] For a great analysis of the role of "interest" within positivist thinking in international law see M. *García*-Salmones Rovira. The *Project of Positivism in International Law*. *Supra* note 29.

such as institutional headquarters and conferences.[96] Given the continued prominence of states' representatives within most international institutions, this "tribal" sociality stays largely between states, but is actualised through the detached legality and space of institutions.[97] On the other hand, the logic of *logos* simultaneously denies international law a social base by "lifting" it (the "international") "over and above" everyday global interactions.

## 5.5. Conclusion

In this chapter, I have demonstrated that the dominant spatio-legal logic dictating the view of international law towards its own conception of the "international" is *logos*. In other words, territoriality (or its absence) dominates the way international lawyers view space and the socio-spatiality of the "international". As with cyberspace, viewing the "international" through the category of *logos* leaves it as a concept which, whether seen as territorial or abstract ("spaceless"), lacks a living socio-spatiality which goes beyond limited territorial configurations. The persistence of the "international" seen through *logos* was further demonstrated through Koskenniemi's and Pahuja's theories/critiques regarding the indeterminacy and critical instability (respectively) of international law and legal argument. In other words, I established that despite both theorists criticising the standard accounts of international law (such as formalism, positivism and natural law), asserting that international law is apologetic (material) and utopian ("spaceless") at the same time, they do not depart from the standard spatio-legal account demonstrated through the idea of *logos* which is at the heart of this thesis' problematic. If international lawyers seek to conceptualise social, legal and spatial experiences of everyday life within

[96] This sociology resembles the sociology offered by Hart, since even though it seeks to view international law as "a social construct," it still fails to go beyond the society of experts, officials and organisations. Orford also point to the focus of sociological approaches to international law on international organisations and the decision making processes. See A. Orford, "On International Legal Method." *London Review of International Law* 1, no. 1 (2013): 177

[97] I am borrowing the term "tribal" from Marti Koskenniemi's use of the word in the Epilogue of *The Gentle Civilizer of Nations*.

their image of the "international", then going beyond the limitation of *logos* becomes a necessity. This move, as I illustrate in chapter six through the analysis of social movements, is crucial for projects of international law which seek to destabilise both the territorial logic of the state, and the non-territorial life (and temporal repetitions) of Empire.

The case for a move to *nomos* facilitates a more sophisticated understanding of the relation between law, space and society. Moving towards *nomos* requires a re-conceptualisation of how international lawyers treat the concept of space and how we understand the legal, spatial and social "world" of international law. In order to be able to conceptualise the legal in its experienced and lived sense, international law and lawyers must simultaneously adopt a spatial framework in which socio-spatiality does not collapse back on the physical/mental binary central to *logos*. This in turn requires an open mind about what is meant by "international law" and to avoid the assumption of fixity of character in a "post-ontological" era.[98] Legal geographers help illustrate that considerations of space are integral and inseparable from questions about law, since law is either seen to *belong* to a physically delimited "setting", or influence the ways spaces are constructed for purposes of regulation. As a result, a shift from *logos* to *nomos* means a move from a territorial configuration of socio-spatiality (seen in binary form with mental space) towards more fluid, lived and experienced notion of space: an understanding which suggests a co-constitutive relationship between law, society and space. This in turn provides us with a conceptual basis for expanding our notions of "community" or "sociality" in international law beyond the states and their geographical bounded spaces into the everyday experiences of people all around the world; socio-

[98] Thomas Franck famously announced in his book *Fairness in International Law and Institutions*, that "[t]he questions to which the international lawyer must now be prepared to respond, in this post-ontological era, are different from the traditional inquiry: whether international law is law." See T. Franck. *Fairness in International Law and Institutions*. London: Carendon Press, 1995: 6.

spatial experiences such as the ones I highlighted through my re-description of cyberspace in the previous chapter. In the remainder of this thesis, I will demonstrate this shift through the lens of social movements and international law and will evaluate its effect on international law.

# Chapter 6 – *Nomos* and International Law: Re-Considering Social Movements

> *We inhabit a nomos - a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.*
>
> *R. Cover*

## 6.1. Introduction

As discussed in the previous chapter, the socio-spatial fluidity of *nomos* offers a more complete view of the "international" which is neither spaceless nor territorially configured, but indeed fundamentally challenges the material/utopian binary of *logos*. As such, the "international" is not only spatial but also (inseparably) social; it is a socio-spatiality which is lived, experienced and dispersed into the fabric of everyday life. What *nomos* achieves, is a challenge to the territorial (or lack of) spatio-legal sensibility of international law (described in terms of *logos)*, and to add a fluid non-territorial sociality to the conception of the "international" that seems to be largely missing from the discourse of international law; a socio-spatiality which I demonstrated in the case of cyberspace.

The shift to *nomos* inevitably destabilises the central position of the territorial state in the social and spatial imagination of the discourse of international law, as well as the

(social/political) "emptiness" of any purely normative claim.[1] An already established path in posing such a challenge at international law is provided by the relatively recent attention paid to social movements in the development of the theory and practice of the discipline (SMIL). In order to further illustrate my thesis, I will consider the critique of SMIL in light of my observations in the previous chapters. The critique of SMIL is significant for international law, since it puts people and their socio-legal experiences, lives and resistance at the centre of its agenda, in order to tell a narrative of international law "from below" and to emphasise the importance of the "local". By taking social movements and inserting them into international legal discourse, both the sociological and hierarchical fabric of international law is challenged.

In the wake of cyberspace and increasing mobility of people and capital, "[s]ocial, economic and political life cannot be ontologically contained within the territorial boundaries of states."[2] Consequently, the experience of social movements and activism has significant overlaps with this increasing porosity of information and capital, made possible to a great extent by the Internet. It is by following this sensibility that I challenge the way in which the socio-spatility of social movements are conceptualised within the discourse of SMIL.

Building on my re-description of cyberspace in chapter four, I will demonstrate that accessing the socio-spatial fabric of contemporary forms of *resistance*[3] which are

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[1] M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument*. Cambridge: Cambridge University Press, 2005: 533- 548. In this section, Koskenniemi responds to critics who argue that claims of indeterminacy lead to legal nihilism. He disagrees by arguing that criticising the "objectivity of the legal argument" does not mean commitment to irrationality "or to an "anything goes" morality. Even though I agree that forms of knowledge do not have to be objective to be considered knowledge, this alternative form of knowledge is inconceivable if one holds on to the presupposed ideas of society and space.

[2] J. Agnew and S. Corbridge, *Mastering Space: Hegemony, Territory and Intenrational Political Economy*. London: Routledge, 1995: 100.

[3] I am using italics because part of my critique in this chapter is directed at the ways in which the predominant use of the term "resistance" reinforces forms of socio-spatial understanding central to *logos*. I will discuss this further in the chapter.

intimately woven with the non-territoriality of cyberspace, requires a fundamental conceptual shift. In line with my argument regarding international law's characterisation of cyberspace, I argue that a socio-spatially fluid framework of *nomos* offers us the modes of analysis needed for this shift.

The outline of this chapter is as follows. First, I will provide a critique of the three main components of the argument presented by SMIL (especially focusing on the work of Balakrishnan Rajagopal) in challenging the formalities and hierarchies of international law, namely the category of the "local", the metaphor of "from below", and the role of Empire as a broad context for resistance (specifically focusing on Hardt and Negri's account).[4] With this background, I then present two cases of the overlap between contemporary social movements and cyberspace (#occupy and #queer), as examples of non-territorial international sociality which are neither captured by SMIL, nor the predominant understandings of the "international" (as presented in the previous chapter). This chapter will conclude with an analysis of what a conceptual shift to *nomos* means for international law, especially focusing on the possibilities it provides for critical projects to capture the multiplicity of socialities and spaces through which life and *resistance* are experienced around the world.

## 6.2. A Critique of Social Movements in International Law

Definitions of social movements are plenty, each emphasising a different aspect of this relatively broad category.[5] John Wilson creates a typology of four kinds of social movements (transformative, reformative, redemptive and alternative) focusing more on the different approaches of the movements.[6] In contrast, Paul Byrnes' definition of social movements highlights the internal characterisations that he associates with social

[4] See generally M. Hardt and A. Negri, *Empire*. USA: Harvard University Press, 2000.
[5] See section 1.2.3.
[6] J. Wilson, *Introduction to Social Movements*. United States: Basic Books Inc., 1973.

movements, including unpredictability, irrationality (non-self-interestedness), unreasonableness and being disorganized.[7] Zirakzadeh's approach to defining social movements is to combine a focus on characterisations and approaches with a reflection on their social fabric.[8] It is not my intention here to agree or disagree with any of the ever-growing characterisations and definitions of social movements offered by scholarship and activists. There are at least two descriptive characteristics of social movements shared between theorists. First, they share a central role for *people* and *groups* in creating, maintaining and directing a fundamentally social experience. It is through embracing this fabric that Rajagopal, for example, has sought to challenge the "elitist" fabric of international law's social reality. It is from a similar sensibility that I proceed in this chapter, the larger aim of which is to make accessible certain experiences of lived sociality, that I also associated with cyberspace in the fourth chapter, within the sphere of international legal knowledge. Second, and interrelated to the first shared characteristic, is the way in which the theorists of social movements view the space of social movements and their spatial relation to the "international" in international law. It is the circumscribed approach to spatiality of social movements (especially as seen in SMIL) that I call into question, and further use my critique as a platform to argue for a re-framed engagement with new forms of socio-spatiality represented by and demonstrated through cyberspace. The literature on social movements and international law currently falls short of grasping a growing range of experiences that not only affect the formation and operation of social movements, but social life in general around the world that are enhanced and created by/through/with/in cyberspace.

Most scholarly work on social movements and international law revolves around the concerns of critical and Third World Approaches to International Law (TWAIL), which

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[7] P. Byrne, *Social Movements in Britain*. London: Routledge, 1997.
[8] C. E. Zirakzadeh, *Social Movements in Politics: A Comparative Study*. New York: Palgrave Macmillan, 2006.

through mostly historical evidence "seeks to dis-enchant international law by revealing its imperialist, gendered and racist underpinnings."[9] The critical and TWAIL attempts to destabilise the privileged position of states within the narrative of mainstream international law uses social movements in order to emphasise the importance of *resistance* in the formation of international law. A cyber-socio-spatial turn works to position social movements beyond territorial understandings of the category of Third World.[10] Scholars mean different things when speaking of the Third World; for instance as an ideological category, a political strategy, a shared colonial history, political geography or in the case of Rajagopal a "certain set of images: of [...] simply lack of modernity."[11] Rather than enter the debate of what the Third World means within international law literature, I focus on the counter-hegemonic/counter-imperial sensibility of TWAIL literature, and its translation into the SMIL literature through socio-spatial categories and metaphors. The descriptive observations of TWAIL scholars regarding the nature of the global political economy and locating the sociality of human life within categories such as the "local" or the "periphery" has the danger of reinforcing the same spatio-legal structure that social movement approaches "locate" resistance within.[12] This is why a different, more comprehensive, conceptual framework

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[9] R. Buchanan. "Writing Resistance into International Law." *International Community Law Review* 10 (2008): 446.

[10] In *International Law From Below,* Rajagopal highlights that he is using the "Third World" not "to mean the exclusivists, politico-territorial space of states, but, rather, a contingent and shifting *cultural-territoriality* which may encompass states and social movements." [Emphasis added] Even though this definition clearly challenges the post-decolonisation, state-based, notion of "Third World", it still fails to imagine the space of "Third World" non territorially, even though this territoriality might at times hint at a conceptual delimitation and closure. See B. Rajagopal*, International Law from Below: Development, Social Movements and Third World Resistence* [hereinafter "*International Law from Below*"]. New York: Cambridge University Press, 2003: 41*,* note 5. On alternative ways of seeing the "Third World" spatially, see also T. Mahmud, "Geography and International Law: Towards a Postcolonial Mapping." *Santa Clara Journal of International Law* 5, no. 2 (2007): 525-561.

[11] See B. Rajagopal, "Locating the Third World in Cultural Geography." *Third World Legal Studies* 15 (1999): 15-19. See also K. Aoki, "Space Invaders: Critical Gography, the "Thirds World" in International Law and Critical Race Theory." *Villanova Law Review* 45, no. 5 (2000): 913-958.

[12] On TWAIL and global political economy, see L. Eslava and S. Pahuja. "Between Resistance and Refrom: TWAIL and the Universality of International Law." *Trade, Law and Development* 3,

that prioritises consideration of socio-spatiality of social movements *as part of the "international"* rather than detached from it through the boundaries (conceptual or physical) between categories such as the "local", the national and the mainstream "international" is needed.[13] For an international lawyer this is important since it potentially transforms the configuration of international socio-spatiality, a fabric which is at the centre of international legal argument and context.[14]

As noted in my earlier analysis, the SMIL literature,[15] in addition to largely belonging to the TWAIL/critical tradition and questioning the elitism of the international legal narrative, opens up a window of analysis through the realisation of the importance of collective action with regards to international law. Ranging from discussions on human rights discourses to environmental practices and opportunities, this literature highlights the role of individuals and groups as more than mere "bearers of human rights".[16] In other words, individuals and groups are seen as more than passive actors locked within a rights/duty relationship with their states, but rather as experiencing and influencing the development of international law. I am primarily interested in the socio-spatial sensibilities of SMIL and their relation to international law, the most important of which is the insistence on a move to the "local" and a desired view of international law "from below". In order to demonstrate my observations and expand on my critique of these two characteristics (the "local", "from below") using the *logos/nomos* distinction, I mainly focus on the scholarship of Balakrishnan Rajagopal, while drawing on the works

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no. 1 (2011): 103-130. See also M. Fakhri, "Questioning TWAIL's Agenda." *Oregon Review of International Law* 14, no. 1 (2012): 1-17.

[13] For an analysis of the predominant understandings of the "international" in international law see chapter 5.

[14] See discussion of Pahuja and Koskenniemi in section 5.4.

[15] See section 1.2.3.

[16] See for instance Stammers, Neil. "Social Movements and the Social Construction of Human Rights." *Human Rights Quarterly* 21, no. 4 (1999): 980-1008.

of other leading scholars of the field.[17] In particular, I draw on Rajagopal's work to demonstrate three important elements/characteristics of the SMIL argument, namely the move to the "local", use of the "from below" metaphor and positioning social movements in a "counter-hegemonic" relationship with Empire.[18]

In *International Law from Below,* Rajagopal intervenes in the TWAIL literature by forming a triangle between international law, "development" and "human rights" discourses, and social movements.[19] Rajagopal repeatedly calls for a fundamental rethinking of international law if "Third World resistance" is to be taken seriously.[20] He makes the case for this rethinking through analysing the historical relationship between Third World resistance and, first, the development agenda of the institutional framework of international law from the League of Nations to the post-Cold-War institutions and, second, human rights discourse. As Rajagopal highlights, he is primarily "interested in how one might de-elitize international law by writing resistance into it, to make it recognize subaltern voices."[21] While pointing to an "extant bias in favour of the 'global'" in the mainstream narrative of international law, Rajagopal lays down the groundwork for a reversal to *the local* for developing an "understanding of the role of social movements in international law."[22] He argues throughout his work that the "local" is often ignored in existing attempts of appropriating the democratic challenge faced in the Third World, because it is either appropriated by the universalising language of the Western "international" (e.g. human rights), or their unique substance is made

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[17] In particular, I draw on the contribution of scholars such as Ruth Buchanan, Neil Stammers and Edward Rubin.

[18] For the former two, I mainly draw on his seminal work, B. Rajagopal, *International Law from Below. Supra note 10.* In the case of the latter (Empire), I point to his analysis in B. Rajagopal, "Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy [hereinafter "Counter-Hegemonic International Law"]." *Third World Quarterly* 27, no. 5 (2006): 767-783.

[19] B. Rajagopal, *International Law from Below. Supra note 10.*

[20] *Ibid.,* at 1 and 295.

[21] *Ibid.,* at 45.

[22] *Ibid.,* at 47.

invisible to the discourse because of limits of territoriality. This is because on the one hand "the resistance of mass movements is appropriated as empirical evidence of the triumph of the human rights discourse" and on the other "the [heterogeneity of] praxis of these social movements is largely ignored."[23] He calls this a "double move of appropriation and invisibility" by international law in dealing with social movements. Rajagopal's characterisation of international law and the "hidden" role of resistance in the development of its narrative are demonstrative of the general sensibility of – and the challenge facing – a large swathe of SMIL literature.[24]

It is common for scholars to consider the interaction between social movements and international law and to challenge (and expand) the SMIL/TWAIL literature through promoting socio-historical methodologies.[25] However, the spatiality of this relationship is scarcely addressed. As critical geography indicates there is also a need for a different understanding of the relation between space, law and the social, alongside considerations of history. Additional engagement with the spatiality of the "international" is required to further the aspirations of this strand of scholarship. This, of course, does not mean that space does not play a role in existing approaches: the focus on the "local" as a spatial (as well as a cultural and political) category allows social movements scholarship to further theorise diversity and plurality, in face of the often liberal, and progress oriented, narrative of globalisation within international law. In this section, I demonstrate, through a three-stage analysis, why a re-conceptualisation

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[23] *Ibid.,* at 166.

[24] See for example R. Buchanan, "Writing Resistance into International Law."*Supra* note 9. For an overview of perspectives in SMIL see J. Mertus, *et al.,* "International Law and Social Movements: Towards Transformation." *American Society of International Law Proceedings* 97 (2003): 295-308. See also K. Khoday, and U. Natarajan. "Fairness and International Environmental Law from Below: Social Movements and Legal Transformation in India." *Leiden Journal of International Law*, 2012: 415-441.

[25] See R. Buchanan, "Writing Resistance into International Law." *Ibid*; *and* V. Nesiah, "Resistance in the Age of Empire: Occupied Discourse Pending Investigation." *Third World Qaurterly* 27, no. 5 (2006): 903-922.

(spatial, legal and social) of international law's fundamental category of the "international" is needed, and why my conception of *nomos* provides an alternative theoretical framework. As such, I analyse the role of the "local", conceptions of "below" and the resistance to Empire in the following section of text, as each of these engage socio-spatial knowledge for SMIL and TWAIL thinking, yet resist the full shift towards socio-spatiality represented within *nomos*.

### *6.2.1. Writing "the Local" into International Law*

An important analytical move by the SMIL literature is moving to the "local" in order to challenge the hegemonic and elitist conception of the "international" and international law. This move is best demonstrated through Rajagopal's final proposition in his book, where he emphasises that "[i]t is important for the discipline of international law to rethink its categories and learn how to take *the 'local'* more seriously in its problematic and contested relationship with the Third World."[26] The turn to "local" is a spatial proposition or choice. It comes from Rajagopal and other SMIL theorists' attempts to problematise the centrality of the state (both as a category and a geographic entity) and the "highly problematic relationship" of international law to the "local" rooted within the institutional framework of the "international".[27] Rajagopal demonstrates that "the place-based praxis of social movements has emerged as an important site of re/formulation and transformation of the space-based global legal discourse."[28] What is important here is the choice to look at social movements as "place-based": Rajagopal suggests that new social movements within the context of globalization happen within "particular enclaves of the 'international' that exist in

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[26] B. Rajagopal, *International Law from Below*. *Supra* note 10, at 296.
[27] *Ibid.,* at 71. Rajagopal traces this "problematic relationship" through the inter-war years and the Mandate system to the post-cold war institutional setting of international law.
[28] *Ibid.,* at 271.

different locations."[29] He argues that in reaction to the new "political spaces" of globalization which disrupt the centrality of the territorial nation state, resistance emerges "along different [local] spatial orderings which are not necessarily organized on a 'transnational' or 'global' basis."[30] Therefore, in his attempt to bring social movements to the attention of international law, Rajagopal makes a spatial choice to draw our attention from the category of the "international" to the "local".

As demonstrated in the previous chapter, the predominant understanding of the "international" in international law fits the spatio-legal conception of *logos*. This conception can be criticised for being seen either as territorial or imagined as a mental/conceptual space of commitments and "shared" values.[31] The dominance of *logos* in international legal imaginations also means the experiences of sociality and everyday relations in the "international" are placed within the bounded entities of mainly territorial states but also institutions. If a territorial placing of social movements is chosen as a strategy of "writing resistance" into international law, the logic of *logos*, which is based on a territorial/abstract spatial binary, remains untouched by a move to the "local" since it still contains the socio-legal experience and resistance within a notion which is territorial ("place-based").

Through the "local", scholars such as Rajagopal seek to access and bring to our attention the "non-global" or "non-international" spaces of resistance. By placing social movements within the socio-spatial category of "local", it "gives undue weight" to the predominant, largely territorial view of the "international".[32] This persistence of *logos* is

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[29] For Rajagopal's discussion of social movements within the context of globalisation, see B. Rajagopal, *International Law from Below*. *Supra* note 10, at 266-270.
[30] *Ibid.,* at 270.
[31] For the discussion of the physical/mental dichotomy in international law see sections 5.2. and 5.3.
[32] Here I follow a similar sensibility to Susan Marks' analysis of the position of approaches within international law, which are critical of "state-centrism", arguing that by defining

fraught with difficulties in the current state of human communications and activism through cyberspace, as it comes at the price of making invisible a range of non-territorial social experiences (including but not limited to resistance) that have become increasingly important and relevant to international relations per excellence. In reinforcing the predominant view of the "international", SMIL, through its turn to the local, prevent international law from taking seriously the experiences of "non-territorial" sociality.

If SMIL seeks to de-elitize international law and its discourse, then it is not only through the move to the local that this can be achieved. In fact, doing so, and limiting "non-elite" forms of socio-political movement to the local, ignores a crucial aspect of contemporary everyday life (shared by a considerable proportion of human life not all confined to the "Global North")[33] and how its spaces have become increasingly in contact with spaces of our daily life which themselves have become increasingly non-territorial. Everyday life and social movements (often reacting to concerns of daily life experience around the world) have come to share the same non-territorial social space.

### *6.2.2. The Need to Move beyond Our "Desire for a Foundation"*[34]

It is not only through the category of the "local" that the spatio-legal logic of *logos* comes through the language of SMIL scholars. Another related trend in this literature is the reliance on the "from below" analogy, when the social movements and experiences

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something negatively, one further brings the object of critique to the fore. See generally S. Marks, "State-Centricism, International Law, and the Anxieties of Influence." *Leiden Journal of International Law* 19 (2006): 339-347.

[33] The statistics on the use of the Internet and membership in social networking websites, in addition to the central role of such spaces to subaltern processes of resistance, e.g. "the Arab Spring", demonstrate that non-territorial experiences of sociality and "resistance" are not limited to the Global North and the developed countries. For a collection of recent papers on "the Arab Spring" and the Internet, See M. Taki and L. Coretti (eds.), "The Role of Social Media in the Arab Uprisings - Past and Present." *Westminster Papers in Communication and Culture* 9, no. 2 (2013).

[34] I am drawing the phrase "desire for a foundation" from Doreen Massey. See, D. Massey, *For Space*. London: Sage Publications Ltd, 2005: 98.

of everyday life are to be put in relation to the wider structure of international law.[35] Everyday life is seen as belonging to a "below" and the "international" of international law located "above". According to de Sousa Santos, what is common amongst the multiplicity of contributions within the legal field engaging with social movements is "the particular, *bottom-up* perspective on law and globalization" which is advanced and illustrated.[36] Globalisation is seen through the lens of hegemony and the everyday social (and political) life of social movements is seen on the receiving end of this hegemonic relationship. At the "above" of this hegemonic (hierarchical) order are a range of interrelated institutions and structures, with international law taking centre stage, supposedly fixing and legitimising the hegemonic order through time and space.

The SMIL literature arguably performs a mere flipping of the direction of this relationship, without questioning socio-spatial connotations of this flip. To recall, the notion of *logos* is associated with fixity of law and legal authority, separated from the fluidity of social life and action. Though seeking to "give voice" to and recognise the role of social movements (which are often absent from the detached "above") is completely understandable, changing the direction of the hierarchy to "from below" does not solve the detachment of the "international" from the "below". Although this approach rightly and accurately "de-elitizes" the international legal narrative, it still operates within the same spatio-legal hierarchical logic of *logos*. There still remains a "below" and an "above" even though the relationship between the two is redefined

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[35] In addition to Rajagopal's *International law From Below*, there are a number of other scholars using this metaphor. For instance see J. Ife, *Human Rights From Below: Acheiving Rights Through Community Development.* Cambridge: Cambridge University Press, 2009; *or* D. della Porta, *et al.*, *Globalization from Below: Transnational Activists and Protest Networks.* Minneapolis: University of Minnesota, 2006; *or* B. S. Santos and C. A. Rodríguez-Garavito (eds.). *Law and Globalization from Below: Towards Cosmopolitan Legality.* Cambridge: Cambridge University Press, 2005.

[36] B. S. Santos and C. A. Rodríguez-Garavito. "Law, Politics, and the Subaltern in Counter-Hegemonic Globalization [hereinafter "Counter-Hegemonic Globalization"]." In *Law and Globalization from Below: Towards a Cosmopolitan Legality* , edited by Boaventura de Sousa Santos and César A. Rodríguez-Garavito. Cambridge: Cambridge University Press, 2005: 4. [Emphasis added]

within the SMIL literature. Laws and law making institutions and bodies of international law, once emerged through the interaction of hegemonic and counter-hegemonic processes, are then put in a fixed and detached position with regards to a whole array of social relationships, lived experiences and socio-political movements.

To move beyond the focus on the "from below" metaphor in international law does not mean that hierarchical political economies of hegemony do not operate. There are many instances where the local engagement with international law is best articulated through the language of resistance while locating the experiences of the people strictly within the local context. However, the reduction of counter-hegemonic socio-political processes to the "from below" approach is problematic. This continued detachment of the "below" from the "above" (with the exception of where the "below" is somehow included, or makes its mark on the "above") reduces the possibilities of engagement and understanding social processes and social spaces where neither the "local" nor the "from below" analogy apply.

An instance where the above/below dichotomy comes through the language of SMIL literature is the insistence on using the vocabulary of "resistance". As SMIL scholars have rightly shown, resistance certainly exists and is worthy of attention in international law. However, the phrase "resistance" suggests something that is being resisted, and in a way externalises the thing being resisted and detaches from the everyday life of the people who are doing the resisting, located above them. In the case of international law, the instances of resistance explored by scholarship, for example the Seattle protests of 1999, seem to suggest that some "international" phenomenon (in this case the World Trade Organization) is either being resisted within the "local", or that "international" legal vocabulary is being adopted (as if chosen at will from the outside and brought to the local) as a strategy of pursuing the goals of social movements.

Probably the most prevalent vocabulary of resistance used by, or associated with, a range of social movements globally is human rights. Edward Rubin has convincingly argued that social movements, in addition to their role in the processes of implementation of human rights, also play an important and undeniable "conceptual role" in the gradual development of human rights as a discourse of resistance.[37] In this way, the central characteristic of human rights becomes conceptually intertwined with a continual and fluid relationship between human rights and power. Basing his argument on this observation, Neil Stammers in his influential contributions to the theorisation of the social construction of human rights through social movements, points out a crucial issue with the position of human rights discourse in social movements. He accurately highlights a paradoxical relationship between social movements and institutions, (which are often associated with the resisted "above") where human rights become transformed from a "pre-legal" stage to a legal/institutional stage. Stammers associates the latter with the "arguments handed *down* to them [activists] by either so-called experts or established political ideologies" and invites "contemporary activists" to "grasp the complexity of the world we are living in."[38] Similar to Buchanan's point regarding a historical methodology, he suggests that in order to grasp and engage with this complexity "we need a perspective through which the general dynamics of social relations can be incorporated."[39] In order to achieve this, Stammers offers a "socio-historical" analysis of human rights which describes it as socially constituted.[40] According to de Sousa Santos, the growing literature on "global social and legal processes" that uses the "from below" analogy/metaphor, performs "a combination of

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[37] E. Rubin, "The Conceptual Role of Social Movements." *Amercian Society of International Law Proceedings* 97 (2003): 296-299.
[38] N. Stammers, "Social Movements, Human Rights, and the Challenge to Power." *American Society of International Law Proceedings* 97 (2003): 301. [Emphasis added]
[39] *Ibid.,* at 300.
[40] See generally N. Stammers, "Social Movements and the Social Construction of Human Rights."*Supra* note 16.

qualitative methods applied to the study of different *locales* that aims to examine the operation of global sociolegal processes shaping events in such *sites*."[41] However, even though understanding human rights within their temporal/social fluidity is an important move, it still holds the above/below distinction intact, and with it the reliance on the "local".[42]

The reliance on the "local" and "from below" arguably reflects what Massey calls "a desire for a foundation; a stable bottom to it all; a firm ground on which the global mobilities of technology and culture can play."[43] This assumption of a "stable bottom" is then combined with an unquestioned character of international law's fundamental category of the "international" which ultimately resolves in *logos*. This is where the problem lies: even though scholars, such as Stammers, try to make sense of social movements within social fluidity (albeit only temporal) the fundamental category of the "international" with which they seek to engage is detached from that fluidity through the logic of *logos* reflected both in reliance on "local" and "from below". This in turn creates problems for taking into account certain forms of social movement and certain forms of social interaction which are neither locatable within a "local", nor can necessarily be positioned against an "above". For instance, in the consideration of New Social Movements through their attempts to "generally abjure power in the sense of control of the state" and seek "instead political alternatives to the state itself,"[44] old spatial referencing becomes problematic. The state is an essentially territorial entity.

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[41] Santos, Boaventura de Sousa, and César A. Rodríguez-Garavito. "Counter-Hegemonic Globalization." *Supra* note 36, at 4.

[42] Costas Douzinas raises a similar point in his discussion of the paradoxes of human rights. See C. Douzinas, "The Paradoxes of Human Rights." *Constellations* 20, no. 1 (2013): 51-67.

[43] D. Massey, *For Space. Supra* note 34.

[44] N. Aziz, "The Human Rights Debate in an Era of Globalization: Hegemony of Discourse." *Bulletin of Concerned Asian Scholars* 27, no. 4 (1995): 14. He distinguishes New Social Movements from "past socialist and communist movements" which sought to replace one form of state with another.

Therefore, an alternative to the state is not just a social, political or a legal matter but, at a fundamental level, it is a spatial issue.

### *6.2.3. Empire, Multitude and the Difficulty of Dealing with Empire*

By turning to the "local" and adopting the spatial language of "from below", SMIL emphasises counter-hegemonic strategies important in challenging the globalizing effect and characteristics of Empire. In other words, the general sensibility of the SMIL/TWAIL literature involves a counter-description to the dominant "imperial" narrative of international law. Hardt and Negri, whose account of Empire plays a central role in some SMIL/TWAIL scholarship,[45] argue that Empire is a "smooth space" where "there is no *place* of power – it is both everywhere and nowhere."[46] This is in contrast to the accounts of empire or imperialism which suggest a broad set of practices "including those by which a great power in essence governs the world according to its own vision, using a variety of means that may or may not include actual conquest or settlement [as with 'classical' colonialism]."[47] As such, although I am committed to a further spatial turn in SMIL contexts, it is important to pause and consider the discourse on Empire in both SMIL and TWAIL accounts.

For Hardt and Negri, "Empire is an *ou-topia,* or really a *non-place*."[48] In characterising Empire as a "non-place", Hardt and Negri also theorise the specific form of *resistance* that "grows within Empire" through the idea of the Multitude.[49] Characterised through

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[45] See for instance B. Rajagopal, "Counter-Hegemonic International Law."*Supra* note 36; R. Buchanan, "Writing Resistance into International Law." *Supra* note 9; V. Nesiah, "Resistance in the Age of Empire: Occupied Discourse Pending Investigation." *Supra* note 25.
[46] M. Hardt and A. Negri, Empire. *Supra* note 4, at 190.
[47] A. Anghie, *Imperialism, Sovereignty and the Making of International Law*. New York: Cambridge University Press, 2005: 273, note 2.
[48] *Ibid.*
[49] Note that I am using resistance in italicised format to distinguish it from the mainstream perspective on the term/concept.

difference and multiplicity, Multitude is different from *people, working class, or the masses.*[50] Similar to Empire, the Multitude is a distributed network of differences with no singular identity and no single place. As Tayyab Mahmud points out, in the same way that the mainstream globalisation literature seeks to show the world (or at least the future of it) at the end of classic geography, Hardt and Negri's account of Empire also seeks to offer an image where space (and place) lose their significance.[51] In assessing the prospects for a counter-hegemonic or anti-imperial international law, Rajagopal and others seek to bring the attention of international law to "the politics of the 'multitude'."[52] However, in doing so, they offer a contradictory account of "resistance" and social movements experience to international law.

As demonstrated above, the physically bounded sense of space and place are far from losing significance in SMIL, but in fact gain importance through the "local" and "from below". If for Hardt and Negri, a consideration of space is besides the point in the operation of Empire and Multitude, then the move to the "local" as a quintessentially spatial category, while holding on to Hardt and Negri's theory, seems to be contradictory. In other words, locating the Multitude within the "local" goes against the "place-less" characteristic of the relation between Empire and the Multitude. This is clearly not a critique of the latter two's scholarship, rather this understanding positions the TWAIL international lawyer who seeks to "write resistance into international law" within a theoretical contradiction, which is primarily caused by the spatial logic of *logos,*

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[50] M. Hardt and A. Negri. *Multitude: War and Democracy in the Age of Empire* [hereinafter *"Multitude"*]. New York: The Penguin Press, 2004: xiv.

[51] T. Mahmud, "Geography and International Law: Towards a Postcolonial Mapping." *Supra* note ?, at 548-554.

[52] In "Counter-Hegemonic International Law", Rajagopal argues that the "future of the world – its ability to deal with problems of peace, was, survival, prosperity, planetary health and pluralism – depends on a range of factors, including the politics of the 'multitude', as Hardt and Negri call the governed." B. Rajagopal, "Counter-Hegemonic International Law." *Supra* note 36, at 780. See also V. Nesiah, "Resistance in the Age of Empire: Occupied Discourse Pending Investigation."*Supra* note 25. For a great analysis of these two see Buchanan, Ruth. "Writing Resistance into International Law." *Supra* note 9.

firmly based within the mental/physical binary. Of course, I am not denying the fact that many forms of resistance, even to the non-territorial forces of Empire, happen within different localities. However, as I will demonstrate in section 6.4, this is not the case for many others, in which case neither "local" nor "from below" capture the socio-spatiality of such movements.

It is in response to Empire that SMIL/TWAIL scholars seek to bring our attention back to immediate effects of and resistance to the forces of global imperial order which both in its operations and effects, are characterised as defying territoriality. However, in so doing, the range of problems that lie with territorial characterisation of social experience, central to *logos* and my critique of it, are ignored. This persistence of *logos* is fraught with difficulties in the current state of human communications and activism through cyberspace, since it comes at the price of making invisible a range of non-territorial social experiences (including but not limited to resistance) which are an integral part of Empire and the Multitude.

## 6.3. The Double Trouble of International Law

In bringing a spatial-legal analysis to international law and its sociality, new limitations within the discipline are made visible. On the one hand, the discipline is faced by Empire and on the other by a conceptual inability to offer any alternative to an essentially territorial analysis. This leaves international law at an impasse. In this impasse, (critical) international law is stuck between two equally problematic positions: to choose to be impartial to the operations of Empire, which poses serious threats to its ability to envision a tangible role as a legal discipline with real emancipatory potential, or, to ensure this potential, the critical legal scholar can choose to resist Empire by falling back on a much criticised "territorial temptation" that I have demonstrated in the case of SMIL/TWAIL scholarship. However, the "local" and "from below" do not

capture the practices and experiences of the Multitude to the full. In contrast, a different spatio-legal vocabulary allows movement beyond the spatiality of *logos* and a way through this problematic position.

To demonstrate this further, I rely on the examples of #occupy movements and #queer activism. By doing so, it becomes apparent that my criticism of "local" and "from below" is aimed at gaining conceptual access to movements that either in their interactions, organisation and mobilization, or via the vision of an "alternative" (or both) do not necessarily view the world through the lens of territorial spatiality.[53] It is regarding these forms of movements and lived experiences (which through the "expansion" of cyberspace have become part of the shared experience of everyday life through social networking websites, etc.) that a solely temporal consideration of fluidity is not enough, as it reinforces the detachment of socio-spatial experience from what is predominantly deemed as the "international" of international law.

If we do not assume a "cut off point" between "below"/ "local" and "above" / "international", then it becomes possible to see social movements as part of the "international", living it rather than just experiencing (the effects of) it, utilizing it (human rights language), or resisting it. In order to access these diverse and multiplicitous realms of non-territorial human/social interaction and movements then the socio-historical approach of Buchanan and Stammers, should be accompanied by an alternative conception of law and space. This conception moves away from the territoriality of the state or the "local", towards embracing the multiplicity and plurality of legalities and power relations within a fluid social space which is essentially non-territorial. This is precisely where I bring in the concept of *nomos*, since it offers a mode

[53] This group of social movements can be seen as part of Aziz's category of "New Social Movements." See N. Aziz, "The Human Rights Debate in an Era of Globalization: Hegemony of Discourse." *Supra* note 44.

of analysis which highlights the relation between society and legality away from the spatial omnipresence of the state as a territorial (physical) entity.

## 6.4. Re-Thinking the Space of Social Movements in International Law: Two Cases

Through the widespread reliance on the "local" and "from below", the existing literature on SMIL fails to envision social movements and sociality outside the logic of *logos*. In this section, I point to two instances of social activity and movement to further emphasis this claim: the #occupy movement and #queer activism.[54] Both of these social movements defy a territorial characterisation of sociality in their operations, goals and strategies. Such movements are often referred to as "global" or "transnational;" an undoubtedly spatial description which still does not emphasise the non-territorial socio-spatial characteristics of the above cases. This is because the two categories often rely on spatial imagery which holds on to physical territoriality as the "location" of the socio-spatial experience of these movements. "Global" suggests a territorial totality. Transnational similarly suggests a simultaneous existence of movements, with similar agendas, *within* specific locales. By focusing on their non-territorial socio-spatiality through *nomos,* I move beyond the spatial limitations of the above descriptions. The examples chosen are non-exhaustive and there are countless examples of social activity and social movement that are not (at least in part) limited to a territorial conception of spatio-legality.[55] For Jeffrey S. Juris, "[n]owhere has [the challenge to "traditional vertical

[54] The use of "hashtags" here is a symbolic move seeking to emphasise the fundamental role of cyberspace (social networking websites, forums, etc.) in the identity formation and progress of the social movements in question. I will further clarify this in text. See section on #occupy.

[55] Other potential occasions for these forms of non-territorial socio-political activism could be seen in instances of transnational women's movements, environmental activism, anti-nuclear campaigns, etc. Even though these movements have had a global agenda for a while, they have become more and more intertwined with everyday experiences of sociality since the advent of the Internet and cyberspace.

hierarchies"] been more apparent than within the realm of collective action."[56] What I seek to do here is to point to these movements as instances of "international collective action [that] cannot be reduced to the sum of local and national protest events and movement actors because we are dealing with different conditions and structures of aggregation and integration."[57] It is these different structures and (social) spaces that I argue are only accessible through a different conceptual framework – namely, *nomos*.

My choice of these movements (#occupy and #queer) is prompted by a concern to identify both what they have in common, but also to point to their difference. To put it in Cohen and Rai's words, these movements seem to share "an implied universal logic,"[58] a universality which is as much premised on sameness as it is on difference and fluidity of identities, concerns, strategies and the multiplicity of their socio-spatial ontology. In their contemporary form, these movements are highly dependent on real-time communication networks (the Internet, telephone, satellites, etc.). What is significant is the way the fluid character of these networks, experienced through socio-spatial phenomena such as cyberspace, enables the realisation of a non-territorial sociality. Furthermore, the possibility of real-time social communication for instance allows movements, such as the labour and women's movements, to transform their so far largely "imaginary" social field,[59] into a practiced, performed and created one which until very recently was difficult if not impossible.

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[56] J. S. Juris, "Networked Social Movements: Global Movements for Global Justice." In *The Network Society: A Cross-cultural Perspective*, edited by Manuel Castells, 341-362. Cheltenham: Edward Elgar, 2004.

[57] C. Lahusen, "International Campaigns in Context: Collective Action between the Local and the Global [hereinafter "International Campaigns in Context"]." In *Social Movements in a Globalizing World*, edited by Donatella della Porta, Hanspeter Kriesi and Dieter Rucht. London: Macmillan Press, 1999: 202.

[58] R. Cohen and M. R., Shirin *Global Social Movements*. London: The Athlone Press, 2000. 9.

[59] I am using the term "imagined" similarly to Benedict Anderson's notion of "imagined communities". In his seminal text, he argues that the "nation" is imagined "because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion." See

In particular, I emphasise the social spaces that are co-produced and lived through/across these social movements. Through the use of countless social networking websites, one does not even need to *be* an activist (in a sense of being physically present in meetings, and actively pursuing a goal) to be part of the non-territorial "social field" of such movements. Exchange of information, communication and interaction happen on a range of levels that cannot be limited to a "local", and concerns and intentions of movements are both non-territorial and lived (non-utopian) at the same time. They exist. We are increasingly experiencing and coming in contact with social movements, not through the local aspect of our everyday life but through non-territorial experience of cyberspace through social networking websites, forums, and online interaction.

In the following section of this chapter, I will explore why some social movements (or some aspects of certain social movements) cannot be understood and engaged with simply through imagining the space of international law via the material/mental binary of *logos*. Limiting the parameters and the characteristics of the following examples by categories such as "local" or "below" seriously undermines their non-territorial characteristics both in terms of their identity and their relation to the experience of everyday life of spaces such as cyberspace. These social movements appear to be part of a transformation in activism that flows from activism into an ever-expanding range of lived experiences that share a form of socio-spatiality, enhanced by cyberspace, which re-formulates the way the "international" is experienced.

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B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso, 1991: 6. Through new communication tools and forums, social movements can have more than just an "image of the communion" in their minds, by in fact knowing, "meeting" (even online) them with time or space absent from their obstacles of communication.

### *6.4.1. #Occupy*

The #occupy movement is one example of a global/international social movement, where cyberspace and interactive social media such as Facebook, Twitter, Tumblr, etc. have played a crucial role. Even though the movement was largely born out of a shared frustration about inequality of wealth distribution and socio-political representation in the United States, it grew into a global social movement in a short period of time.[60] #Occupy grew into an idea, a "work in progress,"[61] which had no set physical place. It was not held by a group of people who could be localised, and was developed through democratic processes, forums and debates both on the ground,[62] and online. The movement clearly consisted of a continuum of social spaces, both materially and virtually placed. Activists made extensive use of social networking websites in order to mobilise, to exchange their views and, most importantly, their lived social experiences. It was, and arguably still is, the sharing of lived stories that created and developed the backbone of #occupy and once shared and discussed, such stories became part of a non-territorial sociality. It was this social space that gave rise to slogans such as "we are the 99%" and countless other twitter "hashtags" and Facebook pages.[63] This co-produced social space was not a utopian/celebratory space of "coming together". Through its very sociality, it produced and sustained a range of social hierarchies as in any other human space.[64] Yet, #occupy epitomises the form of socio-spatiality I

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[60] The #occupy movement started after an online blog and email list called Adbusters posted a blog asking their supporters to physically occupy Wall Street in 17th September 2011.
[61] www.occupy.com/about
[62] This was done through what was called general assemblies, which were democratic processes where anyone who wanted to share an idea was given the chance to voice it and everyone in the crowd created ways of reacting to and debating those ideas.
[63] "We are the 99%" originated in the Tumblr blog page of an activist called "Chris." It is also attributed to the anthropologist David Graeber.
[64] Even though their sought-after democratic process was to be as inclusive and fluid as possible, distribution of responsibilities both online and on the ground inevitably produced a range of hierarchies and responsibilities, e.g. different people in charge of different parts of the encampment, some in charge of dealing with the press, etc.

perceive as international, because it operates on the basis of an experienced and lived socio-spatiality which is not confined to a specific territory.

When Lawrence Lessig was writing on the #occupy movement in November 2011, he began by talking about the social movement by saying that "the protesters #occupy(ing) Wall St are looking for answers [...]"[65] This is a significant move in the way a prominent legal theorist and specialist in cyberlaw speaks about this movement. By adding the hashtag sign to the verb "occupying" he is hinting at an important spatial shift in the way social movements are imagined and talked about. The difference that the hashtag sign makes is that it signals a move away from pure localisation of a social movement, and instead connects it to a fluid social space (cyberspace), that is essentially non-territorial. Notwithstanding this, territory and territorial experience continue to be present and local concerns are real. After all, the occupation of specific territorial spaces was (remains) central to the #occupy movement. Like international law, the creation and maintenance of a non-territorially defined social space does not dislodge the lived territorial condition. Non-territorial refers to forms of socio-spatiality which is not in a "container-like" relationship with territory, but one which discursively (through the discourse of the social movements and the interactions happening) co-constructs its relation to the material (territorial) space, while remaining essentially social and multiplicious.

Even though physical occupations of material spaces within cities seem to have subsided, new sets of social communications techniques and ideas (such as the "99%" imagery) are being used, experienced and lived on a day to day basis within online forums, new and old media, and everyday conversations. In addition, "occupy" has

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[65] L. Lessig, "#OccupyWallSt, Then #OccupyKSt, Then #OccupyMainSt." *Huffington Post.* 10 May 2011. http://www.huffingtonpost.com/lawrence-lessig/occupywallst-then-occupyk_b_995547.html (accessed August 22, 2014).

become a word used and shared by a range of different groups, with a multiplicity of goals and stories, which do not necessarily involve the physical occupation of a space. Entering #occupy in the Twitter search box allows us to see how the hashtag has developed the concept of occupy because of the fluidity that is cyberspace. A simple word acts as a flexible sign, connecting stories of everyday life to social activities of both local and global nature. As a social movement, #occupy is therefore not localisable, since it lives through the non-territorial social field that is created through the sharing of stories, non-territorial access to websites, in principle allowing almost anyone to participate.

Despite the range of critiques directed at the ways the #occupy movement conducted its protests and dealt with problems of representation, one could contribute and play a part in the formation of the movement and experience its sociality even without being present in the material setting of protests.[66] For instance, throughout the time of the "encampments" and afterwards, the questions regarding organisation stability, goals and the future of the movement were the subject of discussion and discourse within a multiplicity of spaces and between a plurality of contributors both online and in the "occupy camps".[67] For instance, lived and multiparty communications were (are) made possible between "general assemblies, working groups and supporters across the

[66] Of course there are a range of valid critiques of purely "online activism" or as it is sometimes referred to "slacktivism." For an analysis see for instance, W. A. Gamson and M. L. Sifry, "The #Occupy Movement: An Introduction." *The Sociolological Quarterly* 54 (2013): 159-163. However these criticisms do not mean that non-physical "presence" in social movements is not important or effective. After all, as I argued above, the role that shared stories through online social media played in the strengthening of the #Occupy Movement cannot be understated.

[67] During the time of encampments, one of the discussions amongst the participants was about their organisation methods which were largely "structureless" and followed a "hyperdemocratic" model of no hierarchies. However after the end of the encampments, participants attempted to continue the momentum of the discussions in the absence of the "general assemblies." One way was through the establishment of websites and new discussion forums and hashtags. Through this, their online "presence" continued, given the centrality of social networking websites and cyberspace for the movements.

Occupy movement" through websites such as *InterOccupy.com*.[68] This is, of course, in addition to social media such as Facebook, Twitter and Tumblr which were absolutely crucial for the #occupy movement. Most importantly, social media permitted the space of the protests to be co-produced non-territorially through the non-territoriality of cyberspace.

In dealing with a social movement such as #occupy, given the dominance of *logos* in the way international lawyers tend to see the "international", it is not surprising that traditional legal analysis engages with the movement in very specific ways. It would not be an exaggeration to say that almost all of the already limited engagement of international law with the #occupy movement has been through the language of human rights. Either the demands of the movement (which is not a singularity but a fluidity of actions and interactions) become theorised under human rights language,[69] or human rights law is seen to be violated by the state in dealing with the protesters on the ground.[70] One can again note the sensibility of *logos* in operation here; the movement is either appropriated by the "over and above" space of the "international" or limited to locating social experience within an "international" viewed as the aggregate of territorial states (with sociality happening within them). As discussed in the previous chapter,

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[68] N. Chomsky, *Occupy*. London: Penguin, 2012: 69.

[69] A look at the different range of goals and demands of the #occupy activists (for instance in the GlobalMay manifesto by International Occupy assembly) shows an important parallel in the diagnosis and solutions of the movement and the language of international law (specifically human rights and development). See generally Occupy Movement. "The 'GlobalMay manifesto' of the International Occupy assembly." *The Guardian*. 11 May 2012. http://www.theguardian.com/commentisfree/2012/may/11/occupy-globalmay-manifesto#start-of-comments (accessed August 2014, 22). The predominance of "international legal language" in the formation of the language of resistance can be theorised through hegemony over people's thoughts (Antonio Gramsci), but this analysis lies outside the boundaries of this thesis. On the hegemonic role and the counter-hegemonic possibilities for social movements and resistance see B. Rajagopal, "Counter-Hegemonic International Law." *Supra* note 36.

[70] M. F. Davis, "Occupy Wall Street and International Human Rights." *Fordham Urban Law Journal* 39 (2012): 931-958. For an extensive report on the human rights violations, see S. Knuckey, *et al.*, *Suppressing Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street*. Protest and Assembly Rights Project, 2012.

human rights simultaneously alludes to a universal and "spaceless" order, while being organised through the medium of rights and duties which are deeply territorialised since the duty is always the duty of the territorial state.

The demands and social processes of movements such as #occupy are not just important for international law because they draw on aspects such as food security, social justice and environmental standards, etc., most of which resonate a range of human rights and development oriented instruments and institutions of international law. On a different level, this form of social movement and experience of shared common goals through the non-territorial sociality of forum and "assembly" participation, is significant to understand and engage with since it challenges the mainstream view of how socio-spatial experience is organised across the globe. More specifically, this form of mobilisation and organisation of ideas, ideals and processes can neither be always associated with a specific (if any) "local" nor can it be put in a strict hierarchical relation with the space of "international" that international law seems to envision for itself ("above"). It is also not a purely virtual social space of resistance happening online since on the ground presence is also significant. This is the reason why I suggest throughout this chapter that with movements that rely on spaces that are "integrated seamlessly into the exiting textures and details of our lived communal [non-territorial] experiences,"[71] cannot be adequately accessed by international law, if scholars, social movements and international law scholarship insists on relying on categories which tie it strongly to the spatio-legal logic of *logos*.

### *6.4.2. #Queer*

Even though many social movements are contained within, drawn from, or "attached" to a specific locale, both in terms of their goals and sociological make up, this is not the

[71] I. Shangapour, *et al.,* "Cyber Social Networks and Social Movements." *Global Journal of Human Social Science* 11, no. 1 (2011): 11.

case for a range of others. The second example to which I would like to point is the collectivity and multiplicity of movements, praxis and interactions that identify with the category of "queer". The queer community is nowhere in particular, yet it is everywhere, in every social setting running fluidly within all forms of socio-sexual experience. There is no ideal form of subjectivity within queer.[72] As a result, activists and communities associating with the movement seem to largely reject fixed categories such as lesbian, gay, bisexual and transsexual, since they are seen as constructed socio-legal categories which detach human subjects from the fluidity of socio-sexual experience, and largely seek "normative inclusion."[73]

Cyberspace has proven to be an essential asset to the expansion and development of the queer movement. The non-territorial and largely anonymous character of interactions in a range of online forums and social networking platforms allows experiences and stories of people to flow freely. Participants and activists then enter into conversations with anonymous users and create a network of interactions that does not necessarily operate on the basis of local identities. Nor is it specifically directed at a certain hierarchically imagined source of power. Their concern is social, their claims are social, their space is social, but their sociality is neither local, nor national. Going back to the discussion of the fourth chapter, this *is* what cyberspace is made of. Embracing the fluidity of the queer identity is impossible if one does not embrace the non-territorial nature of this social experience, in parallel with the local specificities.

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[72] Although, given the fluidity of its character, queer might actually be treated as a form of living ideal which is not associated with fixity or detachment from social experience, but rather created through human life itself.

[73] D. Otto, "Queering International Law: "Taking a Break" from "Normal": Thinking Queer in the Context of International Law [hereinafter "Break from Normal"]." *American Society of International Law Proceedings*, 2007: 2.

A look at online queer communities/forums indicates how territoriality (local or international) does not emerge often as a central part of the discussion.[74] Neither does it seem to limit the goals, actions and solutions to a specific bounded space/society. Websites/forums such as Reddit, Twitter, or Tumblr are forums where experiences of "queer" which are largely deemed as "local" or "national", are in constant interaction and communication with the use of simple tools such as "#'s" and many other interactive online media. Tweets and re-tweets, discussions, comments and referrals, happen with the use of a single "hashtag" which brings local experiences such as the Pennsylvania judgment on gay marriage or the resolution of the African Commission on LGBT rights, within one ever-expanding fluid space of social relations and fluid identities. This space of shared experiences and interrelations is neither local, nor completely virtual. It expands with conversations and interactions regarding the queer experiences and concerns.[75]

Probably the best example of this is the "micro-blogging" service Tumblr, which allows users to create their own blogs and post materials (video, image, text, etc.), and for

[74] One of the best "platforms" to access the form of fluid interaction around queer concerns is through the micro-blogging website Tumblr. These blogging pages allow the blogger to post images, videos, and texts that are not necessarily territorially identifiable, and others who also do not have a territorial identifier on their accounts and "like," re-blog the posts. There are countless blogs with different agendas and interests, posting and reposting pictures, videos, text, etc., engage in conversations and through this they create a fluid network of interactions. This form of activity occupies a large portion of online queer activism.

[75] Given the fluid range of issues that concern queer activism, it is impossible to provide definitive examples, since each blogger has their own interests and their preferred method of communication. Sometimes blogs draw upon everyday issues and topics that refer to a specific locale. This, however, does not remain so, since other bloggers, with little identifying territorial presence, might re-blog the posts and as a result create a non-territorial web of social relations around a topic which may very well be about a particular place. In other instances, some bloggers (e.g. Fandoms and Feminism (www.fandomsandfeminism.tumblr.com) put some form of territorial identification (in this case the place she was born). However, there is no indication as to where this person is at the moment, nor at the time of posting the posts. This is arguably irrelevant since one's ability to post and re-blog other posts essentially detaches the social space of activism from one's territorial setting, without making it absolutely irrelevant.

others to comment, debate, share and endorse the content of the posts.[76] The fluid expansion of this micro-blogging network of interactions happens every time a conversation occurs around a post by a user. These posts can themselves be a re-posting of another user's comment or link, sometimes connected to mainstream media and news websites. In addition to the fluid structure of cyberspace which makes this network essentially non-territorial,[77] most users and their comments are often not accompanied with a territorial signifier and this therefore makes the locality of the user who makes the comment or the initial post irrelevant and absent.[78] The knowledge and sensibility of queer is therefore built through multiple, interrelated layers of images, texts, signs and icons that clearly resist being territorially or temporally classified, but instead construct a non-territorial and fluid international space.

The socio-spatial structure described above is at odds with approaches which often immediately seek to locate these experiences within a specific locale, and seek to reflect on the regulatory regime which conditions that experience as the concern of law. This latter approach is often inevitably accompanied by fixed categories such as gay or lesbian which require an activist to detach their legal claim from their lived experience. Sarah Keenan makes this point nicely when she argues that her "use of the terminology [gay/lesbian] is an acknowledgment of the narrowness of legal identity categories and of the reality that not all queer women define themselves as 'lesbians', but might do so

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[76] These characteristics are not limited to Tumblr, but are experienced in many different social networking forums such as Facebook and Twitter, where the diversity of their membership is unprecedented in human social interactions.

[77] For an overview of the decentred structure of the Internet as a network of networks see Appendix 1. For a discussion of cyberspace as a fluid social space of multiplicities and interaction, see section 4.3.

[78] For instance, not all users on Twitter have a location attached to their accounts. This is the same in Facebook. However, given the unique number of each computers IP address, one who has the skills might be able to source the location where the message came from. This, however, is not something that is experienced by users on a daily basis, and as long as an identifying sign such as a flag or the name of a country/city is not immediately visible next to a user's name (e.g. a participant in an online discussion), the location of the user is neither immediate available nor particularly significant.

strategically when *engaging with law.'*"[79] Even though Keenan's analysis regards domestic legal systems, her perspective resonates well with the way non-normative sexual orientations are dealt with within international law.

Looking at the predominant engagement of international law with non-normative sexual orientations and identities reveals the clear preference for the more fixed categories such as gay and lesbian.[80] The logic of pushing for domestic legal reform through human rights vocabulary and legal instruments largely dominates the engagement of international law with queer activism.[81] Therefore, following Keenan's observations, it is not surprising that international law also prefers the LGBT framework, which more or less operates within what Diane Otto refers to as "the dualism of heterosexuality and homosexuality."[82] It is only within the past decade that queer activism has begun to specifically distance itself from LGBT, and this distancing only means the distancing of the language of international law (and human rights) from the lived experience of activists and movements which do not associate their lived, and socially experienced identity as neither fixed by categories such as gay, straight, or lesbian, not by their physical location. The queer movement is more socially and spatially fluid than LGBT, and international law seen through *logos* will only seek to impose fixity of location and identity categories because of its spatio-legal logic. For instance, this could be seen in the case of context-based (jurisdictional) human rights debates on gay marriage.[83] As

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[79] S. Keenan, "Safe Spaces for Dykes in Danger: Refugee Law's Protection of Vulnerable Lesbians." In *Regulating the International Movement of Women: From Protection to Control* , by Sharon Fitzgerald, 29-47. New York: Routledge, 2011: 30.

[80] For a detailed overview of the development of legal debates within international legal bodies and conferences regarding sexual orientation, see D. Sanders, "Sexual Orientation in International Law." *International Lesbian, Gay, Bisexual, Trans and Intersex Association*. 16 May 2007. ilga.org/ilga/en/article/1078 (accessed June 14, 2014).

[81] See R. Wilde, "Queering International Law: Introduction." *American Society of International Law Proceedings*, 2007: 1.

[82] D. Otto, "Break from Normal." *Supra* note 73, at 2.

[83] This debate is between proponents of the human right to enter into marriage for same sex couples. As it stands in international human rights law everyone has the right to marriage regardless of race, ethnicity or religion (ICCPR Art 23(2)). However when sexual orientation is

Ralph Wilde identifies, "'queer theory' [is] an approach to ideas rooted in the experience of non-heterosexual sexualities in the world."[84] The fluidity of the queer experience does not seem to be able to find a socio-spatial presence in international law,[85] so long as the "international" is seen through the spatio-legal binary of territory/abstraction. The #queer movement's relation to international law can neither be theorised as apologetic, nor utopian.

Moving away from the language of mainstream international law and to the SMIL literature does not seem to offer an understanding of this fluidity either. In order for these interactions and experiences to become a concern of international law and social movement, they are either ignored (only to be "dealt with" through the professional, bureaucratic framework of human rights organisations and international institutions) or limited within the "local" in order to enable a discourse of resistance "from below" in international law. However, similar to the #occupy movement (at least certain aspects of it), "the experience of non-heterosexual sexualities in the world" is far from something that can be localised.

In the same way that cyberspace is a social space which is neither purely discursive nor completely material (physical), there is no above or below to the relationship of queer activism with the wider socio-political body. Queer activism *is* the fluid life experience

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included in the possible limitation, it becomes a matter of domestic jurisdiction and international law has so far had a very limited role in guaranteeing equal "universal" rights "regardless of sexual orientation." On this debate see for instance N. Crombie, "Same-Sex Marriage and International Law in the Ninth Circuit." *Jurist.* 29 December 2011. http://jurist.org/dateline/2011/12/nathan-crombie-marriage.php (accessed August 9, 14).

[84] R. Wilde, "Queering International Law: Introduction." *Supra* note 81, at 1.

[85] Sarah Lamble argues a similar point with regards to domestic legal frameworks. She argues that the "invisibility of transgender and lesbian bodies in the legal domain may be an effect of particular modes of legal rationality that actively render queer bodies and sexualities unknowlable and unthinkable." For Lamble's reflection on the unknowlable and unthinkable bodies and sexualitites see S. Lamble, "Unknowable Bodies, Unthinkable Sexualities: Lesbian and Transgender Legal Invisibility in the Toronto Women's Bathhouse Raid." *Social Legal Studies* 18, no. 1 (2009): 111-130. See also S. Keenan, "Safe Spaces for Dykes in Danger: Refugee Law's Protection of Vulnerable Lesbians." *Supra* note 79, at 34.

of the people who actively contribute to the creation of blogs and forums, and perform a queer life rather than simply pursuing a queer politics. The extensive social presence of "queer" is evidence of the non-territoriality and fluidity of the socio-legal identity of queer. Given the argument of the previous chapter, for international law to have an engagement with this fluid social identity formation, a fundamental shift in the ways we (as international lawyers) view the socio-spatial "international" is needed. The lived space of queer is very much at odds with the space of *logos*. Even though some international law theorists and scholars have paid attention to the potential of queer theory for international law,[86] the spatial qualities of the queer movements and the ways in which it challenges the fundamental categories of the discipline are absent from the discussion.

The discipline of international law and specifically the scholars considering the role of social movements within international law would benefit from a conceptual framework that does not seek to enclose (spatially and conceptually), detach and fix sexual identity from the fluidity of its socio-spatial performativity; a detachment which is necessary for legality under the framework of *logos*. Thinking about law in terms of *nomos* is to pay attention to the experiences and interactions amongst this community, which are queer before being "local" or "below". In the next section, I will explain further how this re-conceptualisation in terms of *nomos* will affect the ways international law tends to view the "international".

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[86] For instance see A. Carline and Z. Pearson, "Complexity and Queer Theory Approaches to International Law and Feminist Politics:Perspectives on Trafficking." *Canadian Journal of Women and the Law* 19, no. 1 (2007): 73-118; See also D. Otto, "Break from Normal." *Supra* note 73; *and* A. Gross, "Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation? [hereinafter "Queer Theory and International Human Rights Law"]." *American Society of International Law Proceedings*, 2007: 11-14; *and* D. E. Buss, "Queering International Legal Authority." *American Society of International Law Proceedings*, 2007: 4-7.

## 6.5. Nomos, Social Movements and the "International"

According to the late international lawyer Antonio Cassese, "*we all live within* the framework of national legal orders."[87] This is exactly the framework that I have challenged throughout this thesis. As examples of #occupy and #queer suggest, we are living at a time where social power is increasingly becoming non-territorial and experienced through a multiplicity of actors and spaces.[88] It is against defining and locating "life" or the lived experience of law strictly "within" the national (territorial) legal orders that I pose the concept of *nomos*. In other words, the aim of this section is to explore the idea of understanding the "international" as neither space-less (ideational/mental/utopian), nor perceived as physically identifiable and definable, identifying a sort of social "in-betweenness". Searching for this "in-between" space of (international) law, I argue for bringing people's lives and sociality into the picture of international law through a simultaneous re-conceptualisation of the legal and the spatial through the concept of *nomos*.

In the previous section, I suggested that not only are New Social Movements "involved in global or transnational affairs,"[89] they are also operating and being experienced in spaces (such as cyberspace) that cannot be localised or nationalised. As a result, we cannot claim to engage *critically* with this form of social power (as sought by SMIL), if our fundamental categories do not allow us access to this form of sociality in the first place. Through the discussion above, I showed how the predominant approaches to international law and the SMIL literature, largely operate within the framework of *logos,* enclose and limit lived social experiences (#occupy and #queer) through sets (often in

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[87] A. Cassese, *International Law*. 2nd. Oxford: Oxford University Press, 2005: 3.
[88] Multiplicity here is used here following Doreen Massey's account of the term. For a description of Massey's notion of multiplicity see sections 3.3.2. and 4.3.3.
[89] L. Coetzee, "World Wide Webs: Social Movements Cross Global Divided in the Public Cyber-Sphere." *Postamble*, 2008: 81.

binary form), categories (mainly human rights), in order to be considered as a matter of international law. In other words, following the spatio-legal logic of *logos* inherent in the mainstream discourse of (international) human rights, non-territorial social experience of certain social movements is fixed within a territorial and regulation centred view of law and space. However, as Aeyal Gross argues with respect to sexual identity that "[i]n the global context, it is [...] necessary to do the complex work of seeing how identities and meanings given to sex are articulated."[90] Understanding and engaging with these complex socio-spatial processes of articulation is the single most important reason for a shift from *logos* to *nomos* in our understanding of the "international".

What the concept of *nomos* (defined through a synthesis of Schmitt, Cover and Delaney's theorisations of the concept) offers is a conceptual framework where, by the coming together of the "living" and the "legal order", we are capable of imagining our life as not necessarily enclosed within the territorial sensibility of the national legal order. Instead, it allows us to embrace approaches which challenge the dualisms inherent in the limited legal imagination which "enable us to pay attention to the 'in-between spaces', 'because they take us beyond the confines of dichotomous thinking to a deeper analysis of the multiplicitous interactions between diverse networks of public, private and hybrid forms of power."[91] It is with this perspective in mind that I argue for understanding the "international" through *nomos*.

*Nomos* provides international law conceptual access to the lived experience of participation and praxis within these movements not as something local but non-territorial. It also does not fix the relation of these movements to international law within the institutional framework associated with international organisations and treaty

[90] A. Gross, "Queer Theory and International Human Rights Law." *Supra* note 86, at 14.
[91] D. Otto, "Handmaidens, Hierarchies and Crossing the Public-Private Divide in the Teaching of International Law." *Melbourne Journal of International Law* 35, no. 1 (2000): 54.

bodies, but rather allows the "legal" to be understood in a non-territorial socio-spatial fluidity. Looking back at the central place of the work of David Delaney in the formation of *nomos* as a conceptual synthesis, law and space are both seen as performative.[92] When law and space are both seen as socially performed rather than physically located, we are provided with a conceptual framework to move beyond territory. The experiences and movements such as #occupy and #queer can be described as non-territorial making the insistence on defining them as local and national obsolete. As Christian Lahusen points out, "internationalization is *a process* in interplay with the national and local level, *but relatively autonomous from it."*[93] Not only is this "relatively autonomous" process socially fluid, it is also produced through the practice (and performativity) of a sort of spatial fluidity that is usually contained and enclosed by the discourse of international law (*logos*), seeking to regulate and to "include" them within its mainstream discourses such as human rights and/or development.

Another important characteristic of *nomos*, discussed in detail in chapter three, is that through the connection of materiality and discursivity within the notion of performativity, the separation of space and law is made redundant through a social link. This is important since it embraces an expanded and reconceptualised notion of law which is as lived and socially performed as are space and society. Therefore, through *nomos,* the social experience and performativity of social movements (and everyday life) through cyberspace simultaneously co-constitute the "legal". This understanding of the "legal" goes beyond (top-down/detached) regulation, and embraces sociality, understood more broadly as an in-between normative universe, both material and discursive, both spatial and legal. Therefore, the considerations of spaces of New ("networked") Social Movements and their place within international law literature is

[92] See section 3.3.2.
[93] C. Lahusen, "International Campaigns in Context." *Supra* note 57, at 202. [Emphasis added]

not just an argument about space, but also an inherently legal one. As shown in the previous chapter, the predominant understanding of the "international" in international law is co-produced through interrelated conceptions of law and space, which operate on the basis of a fundamental distinction between the two, enshrined in *logos*.

By viewing social movements, cyberspace and the "international" through *nomos* international law finds access to an in-between space beyond *logos*, between the territoriality and the spacelessness of the "international" as seen predominantly in international law. This is the space that is co-constituted, amongst the plurality of other forms of normative social fields, by social movements with a non-territorial agency, sociality and agenda. Through the concept of *nomos,* we are enabled to access forms of society and sociality that do not operate on the basis of spatial or institutional hierarchies but rather characterised through communication networks amongst a plurality of people. After all, as Castells points out, "[c]ommunication is at the heart of human activity in all spheres of life."[94] The notion of network that I am using here is close to Bruno Latour's use of the word. As he explains, the reason he chooses "network" as a central theme is that "it has no a priori order relation; it is not tied to the axiological myth of a top and of a bottom of society; it makes absolutely no assumption about whether a specific locus is macro- or micro- and does not modify the tools to study the element 'a' or the element 'b'."[95] The experiences of sociality that are central to the conceptual build-up of *nomos* resemble this understanding of "network" in a sense that they are not "organised" through a spatial logic that embraces a "physical" notion of "bottom" and "top" but rather operates in a more fluid and indeterminate fashion.

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[94] M. Castells, *et al., Mobile Communication and Society: A Global Perspective.* Cambridge MA: MIT Press, 2007: 1.

[95] B. Latour, "On Actor-Network Theory: A Few Clarifications Plus More Than a Few Complications." 1997: 5. http://faculty.georgetown.edu/irvinem/theory/Latour-clarifications.pdf (accessed August 2014, 25).

Therefore, the geography I point to for the "international" through *nomos* is one where scale does not necessarily characterise the workings of legality (jurisdiction) or power. In what Agnew calls an "integrated world society" model, "[t]ime and space are both defined by the spontaneous and reciprocal timing and spacing of human activities."[96] Even though I am not going as far as describing the "international" as an integrated world society, the centrality of human activity to the construction of the "international" as a space is vital to the move to *nomos*.

The access to the non-territoriality of the above social movements and their discussion through *nomos* disrupts the predominant relationship that exists between the discourse of international law and the idea of sovereignty. *Nomos* reconceptualises the "starting point" of law from the idea of sovereignty (partly based on territoriality and partly through abstraction),[97] to the social, spatial and legal experiences emerging through the performativity of everyday life. What it allows us to do is to envision a way out of international law's "double trouble" through providing international law a middle space of analysis. *Nomos* allows international scholars to move the legality of international law beyond the bounds of territoriality (and sovereignty) and at the same time avoid falling back on the place-less operations of Empire. In addition, it allows us to weave the co-constitutiveness of law, space and society into the fabric of international law without relying on categories and entities which prevent us from capturing the non-territorial fluidity and multiplicity of the Multitude as the resistant child of Empire. The approach of *nomos* is not strictly in contrast to the operations and effects of (state) territoriality. Instead, it allows us to imagine as the starting point for international law the non-

[96] J. Agnew, "Political Power and Geographical Scale." In *Political Space: Frontiers of Change and Governance in a Globalizing World*, edited by Yale H. Ferguson and R.J. Barry Jones. New York: State University of New York Press, 2002: 120.

[97] See discussion on *logos* and the characteristics of law and the role of sovereignty in forming the positivist tradition, at section 3.2.

territorial socio-spatial dimensions through which social movements (and indeed a large portion of everyday social life) increasingly operate.

My insistence on reconceptualising the "international" through a move to *nomos* should be treated as a double interjection. On the one hand, it is specifically aimed at the discourse on the role of social movements and their relations to the "international" and the formation of the "legal" in international law. On the other hand, embracing the non-territorial spaces of everyday life and social movement activism by reconceptualising the "international" through *nomos* can be read as a turn against the rigid formalism of international law more generally. David Kennedy points to this rigid formalism in the case of internationalized commercial and financial markets. He argues that:

> Indeed, the world of public international law, like the institutional apparatus of the U.N. family, seems hopeless in the face of the international market. Public international institutions seem, as they have seemed in every generation, far too focused on the state to regulate market actors, and far too formal in their approach to law to be able to construct a modern market regulatory regime.[98]

The critiques of formality (and the overt focus on the state) are common to many "critical" scholars of international law. However, the ultimate goal of a better and more fitting regulatory regime still seems to be central to such projects and arguably ensures a predictable fate for critical projects. In other words, this critique of formality eventually leads to projects of reform and renewal rather than a serious engagement with the informal.

There is a fear of the informal within international law, even amongst critical scholars. The most direct example of this is Koskenniemi's argument that "there is a danger that the critiques of the state – as much a part of international law as statehood itself –

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[98] D. Kennedy, "Receiving the Interational." *Conneticut Journal of International Law* 10, no. 1 (Fall 1994): 16. [Emphasis added].

collapse into an uncritical endorsement of informal social power."[99] Many sceptics fear that by moving to the "informal" will bring us to the realm of indeterminacy where international law collapses on a "*simply* subjective and arbitrary" idea of politics and law loses any form of objectivity.[100] If, for something to be called law, the international lawyer feels obliged to perform a "universalising act" of detachment (associated with *logos* and highlighted in the previous chapter in the context of Pahuja and Koskenniemi's critique), then formality (however "indeterminate") still seems to be the inevitable outcome of juggling apology and utopia. Koskenniemi dismisses this worry and offers to solve it by taking an alternative position to the subject/arbitrary view of politics. Koskenniemi's solution to this problem is to show that "political views can be held without having to believe in their objectivity and that they can be discussed without having to assume that in the end everybody should agree."[101] Yet, this solution is, at best, limited since it is only directed at how international law views politics and leaves the criticism of the "legal" out of the picture.

A turn to *nomos* allows international law a way out of its own sociological/spatial "emptiness" by offering a possibility of (an already existing) sociality, seen through the lens of everyday socio-spatial experiences of human beings, which may be regarded as "international". Koskenniemi's warning against an "uncritical endorsement of informal social power" is extremely important. However, more emphasis should be put on the "uncritical" rather than the "informal" in this warning. This fear seems sensible only if one holds on to the fundamentals associated with *logos* which claims a strict distinction between law, space, society and politics, viewing sociality as physically bounded. The

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[99] M. Koskenniemi, "What Should International Lawyers Learn from Karl Marx?" *Leiden Journal of International Law* 17, no. 2 (2004): 229-246.

[100] On the indeterminacy of law and difficulties posed to law as a result of this indeterminacy see D. Kennedy, *A Critique of Adjudication.* London: Harvard University Press, 1997. For an anlaysis of indeteminacy in international law see M. Koskenniemi, *From Apology to Utopia. Supra* note 1.

[101] M. Koskenniemi, *From Apology to Utopia. Ibid.,* at 536.

fear of the "informal" can become obsolete, or sidelined, if parallel to its endorsement we also question the fundamental conceptual framework through which we view the trio of the legal, the spatial and the social. The fundamental questioning is encapsulated within the concept of *nomos*. As I suggested in the previous section, an example of this critical attitude towards looking at informal social experiences and actions, is to question the hierarchical image we have between what is formally international and legal, and what is social and informal. The approaches to social movements, by relying on "from below" and the "local", are prone to this uncritical endorsement. *Nomos* offers us a conceptual framework that does not require formality for the "legal". Therefore, it allows us to see the "legal" as being performed not only through the formal and official outlets (states, diplomats, NGOs, international organisations, etc.) but through non-territorial social experiences and spaces as well.[102] Through this expansion of understanding the "international" (through *nomos)*, plurality is not limited to the political, but also to the sociology and legality of international law and how it is performed and how it operates. By doing so, international law moves through this fear of informality without endorsing a purely indeterminate view of politics (and law) because formal determinacy is removed as a necessary condition of the "legal". As a result the sociological base of international law is expanded; experiences of everyday life find a way through to this sociology, not at the "receiving end" of international law but at the heart of international law's aspirations towards an idea of justice.

## 6.6. Conclusion

To further illustrate my thesis, I directed my attention/critique specifically towards the growing literature on social movements and international law, whose main goal is to "de-elitize" international law while taking a generally anti-Imperial position. Following

[102] The notion of performativity is at the heart of *nomos* and is explained in detail (especially in reference to David Delaney's theory) in section 3.3.2.

the observations of the previous chapter, and my argument regarding the spatio-legal characteristics of the predominant understanding of the "international" as *logos,* I suggested that the SMIL literature is no exception; i.e. their categories and analyses do not allow us to go beyond *logos*. In other words, their arguments still operate on territorial understandings of social experience ("local"), and seek to *include* social movements through reversal of the hierarchy of law from "from above" to "from below". Moreover, I pointed to the role of Empire (as characterised by Hardt and Negri), and established that the "local" and "from below" categories of analysis do not capture the fluid experienced character of resistance within Empire (theorised through the idea of the Multitude by Hardt and Negri). Through two examples, I demonstrated that the current discourse of SMIL cannot capture the "networked" structure of "resistance" enhanced and enabled through cyberspace. Doing so is necessary for international law to connect to the lived and experienced spaces of the "international" and to go beyond the "double trouble" of fighting a territorial and a "place-less" battle at the same time.

Territorialising the growing set of social experiences and interactions which are intertwined with the fluidity and non-territoriality of cyberspace further separates international law from the very experiences that co-produce plural and multiplitous social spaces of international law. The discussion of this chapter further illustrates my point regarding a need for a fundamental re-conceptualisation of the socio-spatial fabric of international law or the "international" using *nomos* as a mode of analysis with a socially fluid and co-produced notion of law, space and society.

# Chapter 7 – Conclusion

> *Hello,*
>
> *So ... One thing ... You might have noticed there are cameras everywhere. We are doing two things with the cameras. One we are recording everything [someone screams] so that in the future we can help... [another scream]... Wow you like cameras!... umm... and also we are live streaming it, so in addition to the 2000 people here, there are about 500000 people watching this at home ... [everyone screams and claps] ... So ... Let's say hi ... Hello 500000 people, scattered around the world!*
>
> *Moby (live in concert, October 2013, LA)*

## 7.1. A Summary

Throughout this thesis, I have provided a critical interjection into the socio-spatial fabric of international law, with a special focus on the overlap between cyberspace and social movements. I demonstrated the case for re-conceptualising the socio-spatial analytical framework of international law, from what I referred to as *logos* to conceptualising the "international" as *nomos*. This re-conceptualisation is necessary for international law, because critics have so far largely focused on the temporal dimensions of international law's parameters. A spatial critique can highlight the socio-spatial continuities of the international narrative that have so far gone unnoticed. This is a timely intervention, especially because in the past two decades, life and social experience have undergone significant transformations in their organisation and ordering, taking an unprecedented non-territorial form to them, largely due to the expansion of the Internet, and via cyberspace. *Nomos* locates the professional paraphernalia of social control as part of a socio-spatially fluid (normative) system.[1] In this framework the "legal" responds to both lived/material conditions *and* the utopian ideals of law which are deemed as co-constitutive and non-separable. Incorporating the wider socio-spatial fluidity allows the interactive sociality of cyberspace, to be understood as part of the

[1] The phrase "professional paraphernalia of social control" is borrowed from Cover's theory of *nomos*. For discussion, see section 3.3.

non-territorial world of law, an important aspect of legal life (living (with) the law) that is otherwise ignored by international law.

I have used cyberspace to question international law's relation with its own understanding of what constitutes the "international", as well as the role and impact of social movements. I initially examined the relationship between international law and the Internet, demonstrating the failure of international law to engage with the socio-spatiality of cyberspace, as opposed to the Internet, unless for a limited role of content regulation. After spelling out the specificities of the *logos/nomos* distinction, setting out my approach to the concept of *nomos,* I argued that *logos* is the framework by which international law conceptualises cyberspace, producing and maintaining a territorially configured international legal structure around it.

My observations regarding the current relation between international law and cyberspace, was followed by a re-description of cyberspace via the analytical framework of *nomos,* placing non-territorial experiences of sociality at the centre of any legal analysis of cyberspace. This, I argued, gives access to an ever-expanding, non-territorial overlap between the lived experience of the legal, the social and the "international". The elaboration of the existence of a socio-spatial overlap through the analysis of cyberspace, brought me to the crux of my thesis; that is, a questioning and an interrogation of the absence of any socio-spatial critical engagement with the "international", beyond the temporal frame of critique, adopted by a range of approaches ranging from critical and New Stream, to TWAIL and SMIL.

Pointing to a range of ways by which international law and legal theory conceptualise the "international", I highlighted how (similar to its engagement with the Internet) the conception of *logos* dominates the analytical framework of international lawyers, both "mainstream" and critical. In other words, territoriality and abstraction (the

physical/mental binary) are the two spatial categories in operation, and sociality is either limited to the domestic/local space or happens within the context of international institutions that are themselves spatially detached from the multiplicity of non-territorial socio-legal experiences. Reaffirming the blind spot of international law towards the socio-spatial fluidities, discussed in the case of cyberspace, led me to the final step of my exploration; illustrating what a fundamental re-conceptualisation (from *logos* to *nomos*) would mean for an area of international law which is most directly affected by the socio-spatial fluidity of cyberspace, the social movements and international law literature.

I substantiated my re-description of cyberspace as *nomos* through the overlap between international law and social movements. Initially, I argued that the relation between the latter two is also characterised by *logos,* demonstrating what it would mean for international law to actually embrace *nomos* as a framework for comprehending and accessing the socially co-produced and interwoven character of the social, legal and spatial experience of international law. Bringing the attention of my critical (socio-spatial) analysis of the "international" to the field of SMIL had an important consequence. Through a critique of the current SMIL literature, focusing mainly on the work of Rajagopal, I demonstrated that even though the intention of the field is to make a historical and conceptual connection between international law and social movements, their conception of both international law and social movements are limited by the social, spatial and legal framework of *logos*.

*Nomos,* as a mode of analysis, allows the international lawyer to look at the world of (international) law, which consists of more than territorially/physically imagined spaces, and to view territoriality as part of the wider socio-spatial fluidity of the legal, the spatial and the social experience of the fabric of the "international". Through my critical use of

contemporary social movements such as #occupy and #queer, I argued that *nomos* brings to light the overlap between non-territorial social spaces of everyday life (and activism), and the socio-spatial fabric of the "international". I finally argued that *nomos* enables us to deal with the "double-trouble" of facing the non-territoriality of Empire on the one hand and the territorial configuration of international law vested in the dominance of the state on the other. By embracing the non-territorial socio-spatiality of lived experience (as exemplified through cyberspace and social movements), *nomos* enables us to conceptualise and "expand" the sociality of the "international" beyond the dominant territorial configuration.

Here, I would like to conclude the journey I have taken through the Internet, cyberspace, international law and social movements, by offering three thoughts on what re-conceptualising the socio-spatial fabric of international law as *nomos* might mean for us more generally. First, I will consider the effect of this re-conceptualised mode of analysis on the sociology of international law. Second, I will reflect on what this revised sociology might mean for international law's emancipatory promises. I will finally conclude the thesis by exploring two ways in which the international lawyer's research agenda might change given the attentiveness to *nomos*.

## 7.2. Towards a Non-Territorial Sociology of International Law

The central argument of this thesis is that *nomos* blends the materiality and the idealism of international law, through conceptualising lived socio-spatiality as the experience of the "international" *par excellence*. To develop *nomos,* without the collapse into territorial or temporal descriptions of the "international", the world of law requires representation as a socio-spatially fluid "universe" of materiality and discursivity, where legal meaning is co-constituted with/through/by the socio-spatial relations and interactions, ranging from between experts and state representatives, to the everyday non-territorial relations

amongst people (groups and individuals). Turning to an understanding of *nomos* that encompasses both sociality and spatiality has important implications for what is considered to be the sociology of international law. As discussed at the end of chapter five, a conceptualisation of law as *nomos* demands that we go beyond the logic of sociological inclusion; it facilitates a transformation in the sociological fabric of international law. It is on the consequences of this transformation that I would like to add some final remarks.

In *From Apology to Utopia,* Koskenniemi famously described "international law as a language and the opposition [between apology and utopia] as a key part of its (generative) grammar."[2] What this suggests, is that international law is in a way the substance of a key structured form that is characterised by "the opposition", seen as a grammar.[3] The structure of international law (legal argument) then seems to act as an empty vessel to be filled with the substantive and "fluid" language of law, which is not limited to either sovereignty (associated with *apology)* or sources (associated with *utopia)* doctrines, but a result of their "merger".[4] In this analysis, the socio-spatial fabric acts as the context for the fluidity of international law as a language; in other words the context in which the language develops and is experienced. Even though conceptualising this fluidity might seem to liberate international lawyers from constant debates between concreteness and normativity, it nonetheless operates within the socio-spatial fabric of *logos,* characterised by a limited notion of sociality which itself is limited by the territoriality of space and the "closure" of law.[5] It is through bringing the attention of international law to these socio-spatial limitations of international law's dominant conceptual framework (*logos*), that I challenged the sociological "emptiness" of the

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[2] M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument.* Cambridge: Cambridge University Press, 2005: 565.
[3] *Ibid., at 573.*
[4] *Ibid.,* at 572 and 575.
[5] For full discussion see section 5.4.

"international". In contrast, the sociology envisioned throughout this thesis is the non-territorial social connections and interactions between individuals and groups, which are international *par excellence*, but cannot be comprehended as such, so long as one hold to the territorial configuration of *logos*.

Following the scholarship of Schmitt and Cover, and combined with the insights of Critical Legal geography, the concept of *nomos* brings to light what I referred to as the co-production of space, law and society. As I demonstrated in chapter five, within the logic of *logos,* sociality either exists *within* nation states (and hence of not much concern to predominant approaches to international law), or *within* the international institutions, which themselves are often composed of entities that are identified territorially (such as states and international institutions). In *nomos,* space is not seen through the territoriality/abstraction binary. Removing the dominance of territory from the conceptual framework of international law, opens up the discipline to a new form of sociology, a sociology which is not stuck within the "grammatical" bounds of *logos*, but instead allows us to see the language and form of law as co-produced and not separated. Through this view, the "international" of international law becomes essentially social, but through a sociality which is non-territorial. Grammar is no longer the form and the territorial socio-spatial fabric, the content. The fluid fabric of *nomos,* seen in this thesis through the socio-spatiality of cyberspace*,* is the context where grammar and the language of law are co-constituted.

The sociality of everyday life and the "international" become overlapping and co-produced. The diversity of socio-spatial experiences lived by Marko, Zaynab, and Arash (the three narratives I started my project with) are part of this co-production; a broader socio-spatiality of the normative universe of *nomos*. By reformulating sociality, the fluidity of everyday life and living (with) the law becomes integral to the world of

international law, and this has potentially important consequences for the emancipatory aspirations of international law. In other words, this newly imagined sociality might make visible an "international" that has so far remained invisible to the territorialising and controlling modes of jurisdiction that connect contemporary international law to its ugly history of emancipatory ambitions entrenched into the fabric of power,[6] as a veil for exploitation or a tool of privilege and civilising missions.

## 7.3. Emancipation of/and International Law

The question of emancipation is arguably central to both mainstream and critical accounts of international law whether in the formulation of a "better world" or in critique of the existing world. Many broad categories serve as the target of emancipatory projects, ranging from war and violence, to Empire and economic exploitation and discrimination (on the basis of race, gender, class, etc.). In order for international law to fulfil its emancipatory potential in the contemporary sociological, political and economic context, I have argued that it is necessary for the discipline to first conceptually emancipate itself from the dominant framework regarding law, space, society and the relation between them (*logos*). As shown through my examples of the overlap between contemporary social movements and cyberspace (#occupy and #queer), it is essential for international law to acknowledge and connect to the socio-spatially fluid fabric of these movements, by re-conceptualising its own fundamental categories. This arguably allows international law to expand what Andrew Lang calls "its *ideational conditions of possibility*."[7] *Logos* stops international law from letting go of a spatio-legal framework (dominated by territoriality and detached regulation), which in turn prevents it from directly connecting its aspirations to the way (international) law, society

[6] Here power is understood in its traditional sense, associated with force, domination and hierarchy.

[7] A.T. F. Lang, "World Trade Law After Neo-Liberalism." *Social and Legal Studies* 23, no. 3 (2014): 408.

and space are being increasingly experienced and lived around the world. *Nomos* provides the framework for the emancipation of international law from *logos*.

Through enabling a non-territorial sociology for international law, *nomos* acts as a conceptual framework which challenges and changes what we consider as worthy of attention for international law's emancipatory promise. One does not necessarily need a socio-historical approach, if one seeks to access international law regarding something contemporary from a critical perspective. Given the incredible increase in the frequency of information exchange, one does not need to wait until an international lawyer or a news website brands something as an issue of international legal concern for it to become a matter of research interest.[8] With the growing shared social space between international law (academic and practice), social movements and everyday sociality of life through cyberspace, a non-territorial, temporally released and socially co-produced *nomos* allows us to roam within the overlap of these fields of performativity *as* the world of international law, rather than something outside it, to be accessed, used and/or regulated.

Of course, regulation and the existing territoriality and material limitations of many aspects of contemporary life are amongst these different fields of performativity, rather than detached from them. For instance, the existence of material limitations such as Internet/telephone connections, or national regulations and controls in many countries, might prevent people from experiencing and living this non-territorial sociality. In other words, there is no sense of utopia attached to the sociality of the "international" within the framework of *nomos*. However, despite the clear limitations, divides and possible dangers of cultural and technological hegemony, one can say with confidence that the

[8] A. Riles, "The View From the International Plane: Perspective and Scale in the Architecture of Colonial International law." In *Laws of the Postcolonial*, edited by E Darian-Smith and P Fitzpatrik, 127-142. Michigan: The University of Michigan Press, 1999.

fluidity of cyberspace has challenged, and continues to challenge, many physical and ideational limitations associated with the experience of everyday life. Furthermore, this is not an experience which is necessarily conditioned by a clear cut North/South divide. This is clearly visible in the context of recent social movements in the Global South, for which the non-territoriality of cyberspace was a crucial asset.

*Nomos* provides a radically different image of international law, from what is taught in academia or practice. In this format, international law is neither "from below" nor "from above". It is rather performed, lived and re-lived through the socio-spatial multiplicities of a normative universe, consisting of the aggregate of territorial state representatives, expert rule, and more importantly, non-territorial social relations concerned with normative claims. The latter has so far not been fully understood as an international space, indeed perhaps *the* international space, unless for regulatory purposes, in which case it is either reduced to a domestic concern, or is treated as the content of a delimited spatio-conceptual form, e.g. the Internet. In this thesis, I have demonstrated that this understanding and engagement can only be achieved through the radically different, yet inclusive, framework of *nomos*. *Nomos* adds to the spatio-temporal relevance of international law, providing both critique of temporal accounts of international law and release from the territorial spaces assumed as dominating encounters in the "international",[9] hence increasing the meaningfulness of any emancipatory dream attached to the realm of the "international".

In chapter six, I explained the trouble of defining the emancipatory potential of international law through the vocabulary of resistance to Empire. Whether one

[9] Pahuja's recent piece "*Laws of Encounter*" provides a radically different account of the international encounter through a "jurisdictional account" of international law, drawing on the *responsibility* of the international lawyer at the moment of encountering the "other" of international law. See generally S. Pahuja, "Laws of Encounter: A Jurisdictional Account of International Law." *London Review of International Law* 1, no. 1 (2013): 63-98.

contextualises resistance within the operations of the global political economy enshrined in the institutional framework of international law (traditional empire: continuation of the territorial sensibility, and its translation into the institutional framework, rule of the experts and territory), or within Hardt and Negri's "place-less" Empire of Capital, international law fails to capture the non-territoriality of international life. If (critical) international law seeks to envision emancipation from the two imperial models (which arguably operate in parallel to one another), then it is essential to grasp and comprehend the complexities, fluidities, and multiplicities of socio-spatial experience, which are increasingly occurring in an overlapping, non-territorial fashion. As pointed out by Hardt and Negri's theory of the Multitude, this complexity and socio-spatial fluidity characterises both the object and the sites of resistance.

When emancipation is at the heart of a legal system, then it is only through experiencing and living (with) the law, that emancipation becomes meaningful to the people who are being emancipated or doing the act of emancipating. Emancipation from *logos* translates into better realisation of the wider emancipatory potential of international law, while avoiding the territorial trap of imperialism on the one hand, and accommodating the fluid and networked social spaces of resisting Empire and hegemony on the other (the Multitude). Promises and potentials of an international society or community, become connected to the spaces of everyday interaction and life, to the social context in which normative claims about what is right and wrong developed.

Therefore, it is necessary to connect the emancipatory promise of international law to an experience of sociality that on the one hand is not bounded by territory, and on the other is not placed at the receiving end of law, but in fact it is the beginning and the end of law. In this thesis, I demonstrated through a multi-sided argument that *nomos* provides the key conceptual framework for an understanding of international law that

places the non-territorial (as well as the territorial) sociality at the centre of the process/life of law, so to be able to respond to both lived/material conditions and emancipatory potential/ideals.

I should however note, that re-conceptualisation is the first step. It is through a re-imagined research agenda, enabled by a re-imagined approach to *nomos* that we can hope to capture what this emancipatory potential means for the people who are living (with) the law and co-constituting the world of international law.

## 7.4. From a Re-Imagined International to a Re-Formulated Research Agenda

Since the central argument of this thesis is that the theoretical and the methodological choices made by international lawyers are intertwined, it is necessary to make some remarks on the possible methodological implications of the theoretical re-conceptualisations offered. Throughout, I have demonstrated how a turn to *nomos* permits the understanding of a form of international engagement that is relevant, necessary and missing in contemporary accounts of the discipline. This theoretical/methodological challenge has direct consequences on the range of research agendas fitting the ambit of international law. In this final section, I would like to point out two interrelated ways these consequences can materialise: first, the transformation of legal focus through the expansion of the world of the international lawyer, and second, the availability of new connections between previously unrated areas of analysis.

The first way the framework of a socio-spatially conceived *nomos* can affect international legal research, is to free the international lawyers from mainstream categories that define what is or what is not the appropriate field or topic of research. For instance, attention to discussion on forums, online comments and social networking websites, trends of

tweeting and re-tweeting hashtags, etc., all become important (if not essential)[10] as an issue of international law. This is because international law is no longer bound by its own spatial and conceptual "closure". This is a direct consequence of looking at the Internet as more than just an empty space, filled with data and content. Instead, one can look at cyberspace as an international/non-territorial field of sociality, revealing a central aspect of living in an infinitely connected world and potentially allowing international law to be a space of future enlargement and relevance.

An example of this could be provided by the developments during 2014, concerning the "Islamic State" (ISIS) in the Middle East, in particular Syria and Iraq. At the time of writing, there is a growing social momentum within social media and social networking websites on this subject (and it is undoubtable that ISIS itself evolved *in part* through a form of cyber sociality). There is significant non-territorial conversation about the advance of this group and the atrocities committed by them. Indeed, a significant number of atrocities have relied on social networks that constitute cyberspace to instigate fear and support for ISIS. Similarly, the sharing and trending of distressing images (of atrocities) shared on social media have prompted and instigated a global fear, which is being translated into a renewed consolidation of authority over both Iraqi and Syrian territory.[11] Configured as *nomos,* the choice of words, affects, agreements and arguments regarding the right or wrong response to this crisis, become accessible as part and parcel of the larger normative, international conversation. This allows the international lawyer to understand the world of international law as consisting of more than just the formalised, pre-existing categories such as international humanitarian law,

[10] See my discussion on emancipation above.

[11] I am referring to Barack Obama's decision on September 10th, 2014, to authorise air strikes not only in Iraq but also in Syria. See D. Roberts, and S. Ackerman, "Barack Obama Authorises Air Strikes Against Isis Militants in Syria." *The Guardian.* 11 September 2014. http://www.theguardian.com/world/2014/sep/10/obama-speech-authorise-air-strikes-against-isis-syria (accessed September 11, 2014).

human rights law, humanitarian intervention, etc. This, in a sense, reflects an "expansion" of the socio-legal field of international law, not just in size but also in socio-spatial form. As such, the emergence of ISIS, and other cyber-savvy violent groups demonstrates how the socio-spatial framework of *nomos* explored in this thesis is not a utopia, rather a lived, human reality that contains all aspects of lived, social experience.

Not only does this approach to *nomos* enable us to engage with debates and interactions regarding international law proper, it also allows us to go beyond the fixed categories and embrace a fluid and diverse normative universe. While drawing our attention to non-territorial social interaction as part of the wider "corpus, discourse and interpersonal commitments" of international law, *nomos* also leaves room for regulation and the more "traditional" research agendas. In other words, *nomos is* the normative world of international law, since in addition to regulation, it allows access to non-territorial socio-spatial experiences as part of that world and not something outside it.

Second, the socio-spatially fluid framework of *nomos* also allows international lawyers to see connections that may have been shielded before. As such, analysis of international law would look at events such as ISIS's advance, or the 2014 Israel-Gaza conflict,[12]

[12] From July 8th, 2014, to August 26th, 2014, Israel and Hamas were engaged in a conflict which involved heavy Israeli bombardment (shelling and air strikes) of Gaza (governed by Hamas) under "Operation Protective Edge," purportedly in response to rockets launched by Hamas from within the Gaza Strip. In this conflict more than 2000 Palestinians (majority civilian) and 73 Israelis (six civilians), were killed. At the time of writing, there is a ceasefire between the two sides, negotiated in Cairo. For current developments and analysis see, for instance, Aljazeera. "Israeli Army Opens Probe into Gaza War." *Aljazeera.* 11 September 2014. http://www.aljazeera.com/news/middleeast/2014/09/israel-gaza-war-probe-201491020115680284.html (accessed September 11, 2014); *or* R. Dixon, "Investigating the Gaza Conflict." *Aljazeera.* 11 September 2014. http://www.aljazeera.com/indepth/opinion/2014/09/investigating-gaza-conflict-201491112454159948.html (accessed September 11, 2014). Also see A. Shlaim, "For Israel, the beginning of wisdom is to admit its mistakes." *The Guardian.* 7 September 2014. http://www.theguardian.com/commentisfree/2014/sep/07/israel-palestinian-unity-land-grab (accessed September 11, 2014).

beyond the territorial and jurisdictional issues often raised,[13] so as to see the impact and increased relevance of non-territorial social movements and conversations which mobilise change and affect decision making at different levels (regardless of the "value" of this change or impact). Contemporary international law does not currently make the connection between a crisis and the social movements, collective expressions of ideas, discussions, stories and analysis that precede, function alongside and/or beyond the "crisis" moment. Hillary Charlesworth points to a similar shortcoming when she argues that "the crisis orientation of our discipline [international law] promotes a narrow agenda for international law."[14] A socio-spatially fluid conception of *nomos* does not operate on the basis of limited categories but instead propels international law into a non-territorial international social space. In other words, all the debates and social interactions based on these events, either based on moral claims or claims of legitimacy, or simply the description and re-description of atrocities and observations, all become part of law, part of living (with) the "international". This constructs connections between international law and those events and the social interactions that are available as/through/on (but not limited to) cyberspace. This framework of *nomos* gives international law and international lawyers a framework to avoid territorialising and localising these views and to think about them as non-territorial. This then flows back into the very understanding of what constitutes the "international", and opens a mechanism for re-imagining the basic categories of the discipline, not constricted by a past that is built on the empire of territory.

Within the socio-spatially aware framework of *nomos,* one does not need to phrase something in the accepted formal format in order for that thing to become a matter of

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[13] I am referring to the consistent use of terms such as "territorial integrity" or "political independence" of states which are fundamental to the territorial imagining of the "international" of international law.

[14] H. Charlesworth, "International Law: A Discipline of Crisis." *The Modern Law Review* 65 (2002): 386.

interest or significance for international law. However, this embrace of informality does not affect the ability of lawyers to make normative claims about things, or assert rules and regulations on different social, economic and political phenomena. As pointed out by Cover, the rules and regulations are "but a small part of the normative universe [*nomos*]."[15] In other words, *nomos* situates those rules, regulations and normative claims within the wider normative experience of everyday life and the everyday socio-spatial qualities of the "international", which "locate [them] and give [them] meaning."[16] It is only in this way that future horizons of international law will be understood as not being limited by past decisions and ambitions.

Ultimately, the analysis of cyberspace, and its practical and theoretical relation to the discipline of international law is much bigger than a PhD thesis. People's social experiences are growing and changing outside the spatial categories that international law has previously deemed possible. The shift to *nomos* may propel the international lawyer to embrace the theoretical (and practical) implications of cyberspace imagined *as* the socio-spatiality of the "international", providing a bourgeoning form of the "international" that was not available in the past.

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[15] R. M. Cover, "The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative." *Harvard Law Review* 97 (1983): 4.
[16] *Ibid.*

# Appendix 1

The beginning of Internet is placed within the European/American research circles which in the cases of Defence Advanced Research Projects Agency (DARPA) and Research and Development (RAND) were also associated with US Defence.[1] The idea of computer networking through information packets, or packet-switching, started from 1960s in UK's National Physical Laboratory (NPL), DARPA (then known only as ARPA), and RAND (apparently parallel without each group knowing about the other). The first proposal was for the creation of ARPANET by ARPA.[2] The development of applications to be used by computers and connected nodes on this network started in early 1970s. It was at the same time that this was shown to the "public" (research communities outside the military) and email was born.[3] Even though the European initiative was not so successful in its realisation in the 1960s, its vision for the potentials of the computer network came to be influential in the decades to follow.[4]

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[1] The Internet is the global network of networks (and computers) that uses the TCP/IP protocols. On the Internet and computer networks, see generally, D. E. Comer, *Computer Networks and Internets.* 5th. New Jersey: Pearson Education Inc., 2009.

[2] The reason that the UK network was not successful in application until much later was that researchers at NPL did not have the resources or the authority to realise their ideas on a national scale. In 1997 the International Packet Switching Service was built in the UK, but this time using technology from a spin-off of ARPA called Telenet.

[3] The new network created by ARPA was first showcased at an international conference in Washington D.C. in 1972. See M. Ziewitz, and I. Brown, "A Prehistory of Internet Governance." In *Research Handbook on Governance of the Internet*, edited by Ian Brown. Cheltenham: Edward Elgar Publishing Limited, 2013: 4.

[4] The American networking project, which was partly financed by the US Department of Defence, was "a project which aimed to explore the possibility of a decentralized (military) communication network which would make it difficult for the Soviet nuclear Intercontinental Ballistic Missiles (ICBMs) to destroy it with one hit." See W. Kleinwachter, "The History of Internet Governance." In *Governing the Internet: Freedom and Regulation in the OSCE Region*, edited by Christian Moller and Arnaud Amouroux. Viena: Organisation for Security and Co-operation in Europe, 2007: 44, note 13. The idea of researchers at Britain's National Physical laboratory for packet switching, was not "robustness of networks," but rather providing an interactive and affordable "computing for commercial and entertainment purposes." See M. Ziewitz and I.

ARPANET was the "mother of the Internet" as we know it; a network of networks with an open and decentred architecture. It was from within ARPANET, by researchers such as Vint Cerf and Robert Kahn, which the currently dominant Transmission Control Protocol/Internet Protocol (TCP/IP) grew during the 1970s.[5] TCP/IP meant that not only computers (the nodes) but also networks can also communicate through the new "network of networks". Given the current dominance of the TCP/IP model, many see the US government as the ultimate source of funding and oversight over the development of the Internet. This, however, is only partly true, given that many initiatives were developed solely within the research community by many researchers who were in essence against many forms of hierarchical government control.[6] The development of the Domain Name System (DNS) or the "Root Server System" was supposedly "without any guidance from or consultation with governmental agencies."[7] In addition, no one has (had) the legal proprietary ownership over any of the protocols and naming systems mentioned above.[8] This is of great importance for the governance of the Internet and the emergence of a range of models in the past two decades or so.

TCP/IP made end-to-end communication between computers and networks possible, without requiring any technical specifications from each network or host. In other

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Brown, "A Prehistory of Internet Governance." In *Research Handbook on Governance of the Internet*, edited by Ian Brown. Cheltenham: Edward Elgar Publishing Limited, 2013: 3. It was the latter vision that eventually prevailed in the formation and development of the truly international Internet.

[5] This protocol took shape at different stages in the development of the Internet, through multiple Request for Comments documents (which are technical memorandums describing methods, behaviours, research, or innovations applicable to the working of the Internet and Internet-connected systems). The early RFCs originated from the first four "nodes" of the nascent ARPANET such as UCLA and Stanford University.

[6] Many of the academics and researchers working on the Internet were part of the 1960s anti-establishment movements, and saw the Internet as an opportunity to "explore alternative governance mechanisms." See W. Kleinwachter, "The History of Internet Governance." *Supra* note 4.

[7] W. Kleinwachter, "The History of Internet Governance." *Ibid*, at 45.

[8] See generally M. Muller, "Who Owns the Internet? Ownership as a Legal Basis for American Control of the Internet." *Fordham Intellectual Property, Media and Entertainment Law Journal* 15, no. 3 (2005): 709-748.

words, it only acted as an open architecture where, in addition to peer to peer information transfer, applications such as the World Wide Web (WWW) were designed and run (of course around 15 years later).[9] Given the openness of the architecture the number of Internet hosts (computers and servers connected to the Internet) expanded during the 1980s,[10] the management of the new independent networks' names and identifications became difficult. As a result the Domain Name System (DNS) was developed. Initially the networks that "popped up" were all purpose-built and restricted to closed communities. During all this time the management and development of this new and expanding Internet was with the research community mainly in the US.[11]

It was during the 1980s that software emerged that made communication outside the ARPANET backbone possible and commercial entities tried to claim copyright on applications and platforms that ran on top of the Internet.[12] However, given the general Internet community culture amongst the early users and developers of both the network and software, proprietary rights claims by big corporation over open-source software, such as AT&T over UNIX, were countered by a new licensing arrangement amongst users and developers called "copyleft". According to Malte Ziewitz and Ian Brown this

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9 The World Wide Web was created by Tim Berners Lee at CERN, as an application that facilitated the exchange and access of information between scientists. Later this application became the face of what most of us know as the "Internet."

10 "Australian Academic Research Network AARNET connected with NSFNET in 1989, by which time there were over 100 000 hosts on the network." See J. Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum*. Perth: Terminus Press, 2008: 6

11 Interestingly, other technologies and networking protocols were being pursued by others at the same time by the likes of Xerox and IBM. However, they were not as successful as the TCP/IP system to take the global Networking by storm. This is partly because the first expansion of the TCP/IP system was by the British JANET and the US NSFNET programmes in 1984 and 1985. The decision to make TCP/IP compatibility a condition for the networks was a key to the dominance of the TCP/IP suit. According to some of the founders of the Internet, "the strategy of incorporating Internet protocols into a supported operating system for the research community was one of the key elements in the successful widespread adoption of the Internet." See B. M. Leiner, et al. "Brief History of the Internet." *Internet Society*. http://www.internetsociety.org/internet/internet-51/history-internet/brief-history-internet#Transition (accessed Oct 31, 2012).

12 UNIX is an operating system which was developed in 1969 by AT&T employees. See M. Ziewitz and I. Brown, "A Prehistory of Internet Governance." S*upra* note 4, at 14.

"enabled programmers to develop software without the constraints of traditional copyright."[13] As a result of this, to date, we have successful (both technical and commercial) open source projects such as Mozilla and Linux.

It is also noteworthy that digital communications were not solely done through ARPANET, and certainly not just in the US. It was during this period (mid 1980s to mid 1990s) that networked communities such as Bulletin Board Systems (BBS) gained in popularity. BBSes were computer systems which for a membership fee allowed users to connect to a database (initially via a telephone line and a modem) and to download and upload software and data, send emails and even chat to other members. Initially local, these networks grew dramatically in size with improvements in technology and reductions in costs. In addition to the growing networked communities, interest in the commercial potentials of the Internet for businesses and entrepreneurs also grew. Until 1995, they were faced by restrictions of commercial use put forward by NSF, who had taken over the funding of the Internet after ARPANET was dissolved in 1990. Although NSFNET had allowed commercial use of the network, it still resisted commercial access to the backbone. Because of the restrictions, online services were set up outside the ARPANET backbone such as CompuServe or The Source. Such companies also created their own applications and offered email services as early as 1978 in the case of CompuServe.[14] Also, importantly and parallel to this, a lot of investment went into Internet Service Providers (ISPs) who were amongst the pioneers of "long-haul infrastructure," making way for network access beyond the local networks, especially after the ARPANET backbone was made available to commercial use.[15] Computer networking and online services were also prevalent in other countries. An early example of such online computer networking services (before the invention of

[13] *Ibid.,* at 15.
[14] These services were provided to users beyond the research community for a fee.
[15] The first public dialup ISP was The World and was established in 1991.

WWW) was Minitel (France), a networking system which relied on French technology for the provision of early online services such as purchases, message boards, and emailing. Minitel became popular in many other countries such as Brazil, South Africa, and Canada (and many others).

Until today the TCP/IP model dominates the Internet. Even the current version of the TCP/IP is likely to have changes made to it, such as the constant changes made to the Internet Protocols. Changes in technologies (wireless, fibre-optic, smart-phones and the unprecedented expansion of personal computers) are commonplace and with these come innovations in networking. However the open structure of the Internet generally based on the DNS, Root Server System, and IP address numbering protocols has remained largely the same over the past years.

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